Supreme Court, U.S.
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In the Supreme Court of the United States

B. MICHAEL SCHNEIDER
& JANINE L. BALLY,

Petitioners,

v.

COUNTY OF WILL, ILLINOIS &
THE WILL CO. BOARD MEMBERS
IN THEIR OFFICIAL CAPACITY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the District Court and Appellate Court must follow the precedent set by this Honorable Court?

2. This Court having held that a government defendant must appear represented by authorized legal counsel set out in the applicable State Statutes.

3. This Court having held that a Court without in personum jurisdiction over a government defendant in a legally cognizable form may not proceed to adjudicate the issues presented in the complaint.

4. This Court having held that a collateral attack by a plaintiff seeking to have a judgment entered in favor of the defendant declared void is proper procedure.

5. Whether the relief under the ADA forecloses other forms of relief available under 42 U.S.C. § 1983 to pendent State law claims.

6. Whether 42 U.S.C. § 1983 relief is available from Federal Courts to require local government to conduct pre-deprivation hearings on a timely filed Notice of Appeal in accordance with procedures mandated by State Statutes when property rights are at issue.

7. Whether pendent state law claims for deprivation of the lawful use and maintenance of property should be heard, and injunctive relief be declared by a U.S. District Court upon local governments when the government is invalidly using its zoning police powers to deprive a person from the lawful use of the property without the pre-deprivation hearing required by state law when the local courts have refused to grant relief.

PARTIES TO THE PROCEEDING

Petitioners are B. Michael Schneider, and Janine L. Bally, resident citizens of the State of Illinois.

Respondents are the County of Will, State of Illinois, and Will County Board Members, Richard Brandolino, Richard Budde, William Bruin, W. Lee Deutsche, Mary Ann Gearhart, James Moustis, Glenn Warning, Ann Dralle, Susan Riley, Marianne Kozlik, Terri Wintermute, James Blackburn, Karen Callanan, John Gerl, James Gale, Kerry Sheridan, Stephen Wilhelmi, Suzi Wiberg, Henry Travis and Joseph Mikan in their Official Capacities as Members of the Will Co. Board.

RULE 29.6 STATEMENT

Petitioners are U.S. citizens residing in the Village of New Lenox, Will County, State of Illinois, which is located in the U.S. District Court Northern District's Eastern Division.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, B. Michael Schneider and Janine L. Bally, respectfully petition for a writ of certiorari to review a judgment of the U.S. District Court of the Northern District of Illinois and that of the U.S. Court of Appeals for the 7th Circuit affirming that order.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the 7th Circuit granting summary judgment is unpublished. The Order entering Summary Judgment for the County of Will by the United States District Court on Northern Illinois is unpublished. Petition for rehearing to the Appellate Court was denied without opinion. The United States District Court published an opinion in denying the County's Motion to Dismiss pursuant to Rule 12 b (6), Schneider v. County of Will, 190 F. Supp. 2d, 1082 (N.D. Ill. 2002).

JURISDICTION

The United States Court of Appeals issued an unpublished order on January 21, 2005, and an order denying rehearing on February 23, 2005.(App. at 1a, 3a.) This Court entered an order On May 19, 2005 extending the time to file a writ of certiorari up to and including July 23, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

RELEVANT STATUTORY PROVISIONS

28 U.S.C. 1652 requires Federal Courts to observe the laws of the State of Illinois when applicable.

28 U.S.C. 1654 requires a party to appear in personam or by duly authorized legal counsel.

28 U.S.C. 1343 (3) authorizes original jurisdiction to the District Court for claims asserting deprivation of civil rights or constitutional rights.

42 U.S.C. 12112 9(b)(4) prohibits discrimination towards an individual because of a known association with the disabled.

42 U.S.C. 12182 prohibits discrimination towards entities because of a known association with the disabled.

42 U.S.C. 12201 b expressly states that the ADA statute shall not be construed to invalidate or limit rights, remedies or procedures of any State or Federal law that provided greater or equal protection for the rights of individuals with disabilities.

42 U.S.C. 1983 provides for relief to a litigant for the deprivation to one's rights, privileges or immunities by a person under any color of law pursuant to any State or Federal Constitution or law.

55 ILCS 5/3-9005 a (4) requires the duly elected State's Attorney in his official capacity to defend the County of Will when required to do so in court proceedings.

55 ILCS 5/3-9008 requires the appointment of a Special State's Attorney by the Court in which the proceedings are pending when the duly elected State's Attorney is unable to defend.

55 ILCS 5/1 6003 requires the Will County Board to take the necessary and proper measures to defend the County of Will with authorized legal counsel (the State's Attorney) Pursuant to 55 ILCS 5/3-9005 a (4) and for the State's Attorney to enter the appearance on behalf of the County of Will into the record of the court in a legally cognizable form.

Illinois Constitution Article II Section 1. Separation of powers No branch of government shall exercise powers properly belonging to another. The legislative, executive and judicial branches being separate.

55 ILCS 5/5 12001 statute confers zoning powers to the County and limits the extent to which those powers can be exercised

55 ILCS 5/5 12009.5 statute confers zoning powers to the County to enact special uses and limits the form in which the special uses can be enacted

55 ILCS 5/5 12011 requires the County to stay all further proceedings involved in an application for a Special Use Permit upon the timely filing of a Notice of Appeal to a ruling made by the County Zoning Enforcement Officer and the subsequent mandated hearing upon the issues raised on appeal. See also County Ord. 14.9-3

55 ILCS 5/5 12012 requires the County Zoning Board of Appeals to schedule a reasonable time for a hearing on the issue presented by the timely filed Notice of Appeal to a County Zoning Enforcement Officer's ruling. It gives authority to the Zoning Board of Appeals to reverse the order or ruling of the County Zoning Enforcement Officer. In Will County the County Zoning Board of Appeals is comprised of the Will County Planning and Zoning Commission members. See Ord. 14.9-4; 14.9-5.

55 ILCS 5/5 12017 requires the County to apply to the local Circuit Court to restrain the use or maintenance of property.

735 ILCS 5/3-101, the Illinois Administrative Review Law requires final written decisions to an appeal from the County Zoning Board of Appeals.

Will County Bed & Breakfast Ordinance Section 8.21 only permits Residences situated in the Agricultural and Estate Zoning Districts to establish a B&B as a "Special Use" while prohibiting residences situated in an "R" Residential Zoning District from establishing a B&B.

Will County Home Occupation Ordinance Section 8.22 allows the Establishment of Home Occupations in all residential zoning districts.

STATEMENT OF THE CASE

This petition seeks the review of a decision by the U.S. District Court to decline to exercise its jurisdiction to require the County of Will's appearance before the Court in a legally cognizable form in accordance with 28 U.S.C. 1652, 28 U.S.C. 1654, 55 ILCS 5/3-9005 a (4) and 55 ILCS 5/3-9008 together with, but not limited to, that Courts' denial of the Petitioners' Motion to Alter or Amend the Judgment pursuant to Federal Rule of Civil Procedure 59 requesting relief pursuant to 42 U.S.C. 1983.

This case involves Petitioners purchase of a property for the purpose of establishing a Bed and Breakfast (hereafter a B&B) that devoted one half of its guestrooms to accommodating disabled and handicapped out-of-state travelers in the Will Co., Il. area for the purpose of burying dead relatives and friends at the Abraham Lincoln National Veterans Cemetery. The establishment of a B&B in Illinois is subject to licensing and regulation enforcement by local governmental authorities as established by the regulations contained in the State of Illinois' Bed & Breakfast Act's regulatory and licensing scheme, 50 ILCS 820. Petitioners sought declaratory judgment, injunctive relief and damages for the actions and inactions of the County for injuries resulting from the County of Will's deprivation of substantive and procedural due process of law and invalidation of the County's B&B Ordinance on grounds that it was a) unconstitutional b) ultra vires c) repugnant to the State of Illinois' B&B Act; d) in violation of Dillons Rule as incorporated into the Illinois Constitution limiting the power of local units of government like the County of Will from exercising powers beyond those 1) conferred by the Illinois

Constitution, 2) those conferred to the County by Statute; 3) those powers necessarily implied for enforcement of the powers conferred by the Constitution or by Statute.

Federal and State Statutes provides for avenues of relief under 42 U.S.C. 12201 (b), related provisions under the ADA and 42 U.S.C. 1983 based on an application of those provisions as well as the clear provisions of State of Illinois law as applied pursuant to 28 U.S.C. 1652. Lower courts have declined to follow provisions of State and Federal Statutes to provide relief that allows Petitioners a just and reasonable remedy.

The District Court's decision in Schneider v. Will Co., 190 F. Supp. 1082, had outlined the parameters for relief for various remedies available for relief under the ADA and Petitioners have conclusively show an entitlement to that relief in their Rule #59 Motion to Alter or Amend the Judgment. A remedy pursuant to application of all remedies available for relief will allow the Petitioners to provide disabled out-of-state travelers in Will County to find disabled accommodating lodging in a B&B home that is not now provided by any B&B facility in the Will County area. Petitioners seek a remedy that will give effect to Congressional intent to provide accommodations to all aspects of the lives of disabled and handicapped individuals in the general.

Petitioners are substantially aggrieved in the following ways:

1. The District Court's decision to decline to exercise its jurisdiction requiring the in personam appearance of Will County in a legally cognizable form is inconsistent with clear provisions of 28 U.S.C. 1652, 28 U.S.C. 1343 (3), Illinois Statutes 55 ILCS 5/3-9005 a (4), 55 ILCS 5/3-9008 and 55 ILCS 5/1-6003 (App. 37a-38a), together with the People v. Wilkenson (supra) which addresses the authorized defense representation of the County of Will by a State's Attorney "in

his official capacity." The 3rd District Appellate Court of Illinois in Wilkenson held that a County or a County Official was restricted to receiving defense representation by either the duly elected State's Attorney or a Special State's Attorney appointed by the Court in which the proceedings were pending. The District Court's decision to waive the appearance of the County of Will in a legally cognizable form is inconsistent with this Court's decision in The State of New Jersey, Complainant v. The People of the State of New York, 30 U.S. 284, which held that representation by an attorney elected by the people as the government's authorized legal representative in accordance with statute is the only means by which an appearance before a court may be had.

2. The District Court's decision refusing to Amend the Summary Judgment decided in favor of the County to one in favor of the Petitionerss was inconsistent with 42 U.S.C. 12201 (b) and 42 U.S.C. 1983 which allows for relief under authority of the ADA.

3. The District Court's decision refusing to invalidate the County of Will's Bed and Breakfast (hereafter B&B) Ordinance because it violates the equal protection clause of the XIV Amendment to the U.S. Constitution conflicts with this Court's decision as explained in Cleburne v. Cleburne Living Centers, 473 U.S. 432, 440 (1985), which held that a zoning ordinance that does not operate equally between all people similarly situated cannot stand, as well as Yick Wo v. Hopkins, 118 U.S. 356, 6 S. Ct. 1064 (1886), which held that a zoning ordinance that was enacted for the purpose of depriving a person from engaging in an occupation common to the community must be invalidated. Petitioners bought the property, with the Will County Zoning Department's knowledge, for the purpose of establishing a B&B. Petitioners were told that the current County Zoning Ordinance did not have a provision for B&B homes. Petitioners were told that

the County would enact an ordinance that would allow the Petitioners to establish the B&B as of right and failed to disclose to the Petitioners that the State of Illinois had enacted the State B&B Act, 50 ILCS 820 (App. 50a) in 1987 that established a comprehensive regulatory code and gave people in a residential home in Illinois a right to apply for licensing in accordance with the provisions of the Statute.

4. The District Court's decision refusing to invalidate the County of Will's B&B Ordinance on the basis that the ordinance violates the State of Illinois' Special Use Act, 55 ILCS 5/5 12009.5 (App.39a), conflicted with the State law which requires a use to be established as a use permitted as of right before establishing the use as a special use.

5. The District Court's decision refusing to invalidate the County's B&B Ordinance on the basis that the County exceeded its authority to enact such an ordinance pursuant to Dillon's Rule as incorporated in the Illinois Constitution, Article VII Section 7 (App. 43a) and was repugnant to the State of Illinois' B&B Act 50 ILCS 820 (App. 50a), was in conflict with 42 U.S.C. 12201 (b) which allows for 42 U.S.C. 1983 relief.

6. The District Court's decision declining to apply strict scrutiny to the County's B&B Ordinance that had, in effect, estopped the Petitioners from applying for B&B licensing that would allow the Petitioners to engage in occupations made common to a residentially zoned community by the State of Illinois' B&B Act, 50 ILCS 820 (App. 50a). The County's B&B Ordinance, 8.21 (App. 43a-44a), conflicted with this Court's decision in Yick Wo v. Hopkins (supra) which invalidated the City of San Francisco's ordinance because of the deprivation to Yick Wo's fundamental right to engage in occupations common to the community.

7. The District Court's decision declining to grant relief pursuant to Petitioners claim of retaliation by the County's

policy of depriving the Petitioners of the occupancy use and maintenance of the farmhouse as a residence without due process of law pursuant to 55 ILCS 5/5 12017 (App. 49a), violating the prohibitions expressed of 55 ILCS 5/5 12001 (App. 48a), is contrary to this Court's holding in Lynch v. Household Finance Corporation, et al, 405 U.S. 538, 92 S. Ct. 1113, 31 L. Ed. 2d 424 which addresses the foundational principles of the individual's right to use one's property for a lawful purpose to which it is devoted.

8. The Appellate Court's decision asserting that there is no ongoing case or controversy conferring jurisdiction conflicts with this Court's holdings in Bell v. Hood, 327, U.S. 678, 66 S. Ct. 773, 90 L.Ed. 939 where the Court held that jurisdiction of an ongoing case or controversy was established if plaintiff's right to "recover could be sustained if the Constitution and laws of the U.S. were given one construction and defeated if they are given another" id at 685, 66 S Ct. at 777.

9. The District Court's decision refusing to grant any of the Petitioners claims of entitlement to relief, was based upon that Court's misapprehension that that the claim preclusion expressed in Williamson v. Regional Planning Authority was applicable to the facts in the instant case because there had been a legitimate zoning decision made by the Will County Board that had allowed administrative review in Illinois State Court pursuant to the Illinois Administrative Review Act, 735 ILCS 5/3-101 et seq. Petitioners' Rule 59 Motion to Alter or Amend the Judgment showed irrefutable proof that the Will County Board was without legitimate authority to have voted on the proposed Special Use Permit Application on October 21, 1999.. Part of the Rule 59 Motion proved to the Court that the Petitioners had filed a Notice of Appeal to an administrative decision made the County's Zoning Enforcement Officer that had reversed that administrators

previously made order upon which the Petitioners had relied in filing an application for a Special Use Permit to establish their B&B. Petitioners asserted to the Court that they were entitled to an invalidation of the vote cast on this date because of the violation of procedural due process rights to a pre-deprivation hearing under 55 ILCS 5/5 12011 and 12012 (App. 39a-40a). The Court declined to grant relief without stating reasons.

REASONS WHY THE WRIT SHOULD BE GRANTED

The petition for writ of certiorari should be granted for reasons related to benefits to be ultimately realized to out-of-state disabled and handicapped travelers in Will County, Il. that are seeking accommodations under the ADA in a B&B. By the allowing the writ Petitioners will be granted new life in asserting their own fundamental rights to establish a business that accommodates the disabled and handicapped under the State of Illinois B&B Act, 50 ILCS **820**, and the associated and controlling zoning laws of the State of Illinois. Granting the writ will permit the Petitioners to establish that their B&B is, in fact, subject to not only those protections against discrimination given in section of 42 U.S.C. 12182, but, are entitled to assert their rights to relief pursuant to 42 U.S.C. 1983 that Petitioners are entitled to Declaratory Judgment that: 1) the County failed to provide a proper and timely hearing to Petitioners' timely filed Notice of Appeal, pursuant to applicable state statutes mandating certain procedures to be followed, 2) invalidates the County's B&B Ordinance because it is unconstitutional on its face and as applied in this case, 3) invalidates the County's B&B Ordinance as ultra vires, 4) the County's B&B Ord. violates Dillon's Rule as incorporated in the Illinois Constitution, and 5) the County B&B Ord. is repugnant to the State of Illinois' B&B Act. Petitioners' assertions of claims seems to boil down to whether Petitioners are entitled to assert other claims for

relief pursuant to 42 U.S.C 1983 in conjunction with the relief afforded under applicable provisions of the ADA pursuant to 42 U.S.C. 12201 (b). The District Court's rulings substantially differ from Petitioners' various claims made pursuant to 42 U.S.C. 12201 (b).

I. Conflict with Decisions by the United States Supreme Court by the District Court related to procedures employed by the Court in establishing in personam jurisdiction over a government defendant in a legally cognizable form.

Fundamental to jurisdiction is the in personam jurisdiction over a municipal defendant to ensure finality of judgment for the Petitioners. Without such jurisdiction the Petitioners have been deprived of obtaining a non-void, non-voidable final judgment in a form immune from a collateral attack by the County due to the improper unauthorized representation by an attorney(s) that had failed to obtain appointment by the Court to defend the County of Will in accordance with applicable State Statutes.

Importantly, before the District Court made any substantive ruling on any matter before the Court, Petitioners presented a Motion to Disqualify the private law firm appointed by the Will County State's Attorney because this appointment did not comply with applicable State statutes that mandate representation of a County by the duly elected State's Attorney in his "official capacity," 55 ILCS 5/5 9005 a (4); (App. 37a); Words and Phrases, Thomson West, 2004 Cumulative Pocket Part, Volume 29A, p. 45, "Official Capacity" citing People v. Wilkenson, 221 Ill. Dec 1, 285 Ill. App. 3d 727, 674 N.E. 2d 794, 3rd Dist. App. Ct. of Illinois, (1996) or one appointed by the Court in which the proceedings were pending under 55 ILCS 5/3-9008 (App. 37a-38a) pursuant to Federal Rule of Civil Procedure #9. State of Illinois' Statutes and the 3rd District Court of Illinois

clearly require representation of a County by the duly elected State's Attorney of the County or one appointed by the Court (a "Special State's Attorney"). State of Illinois' statutes clearly authorize the Court in which the legal proceedings are pending to appoint a Special State's Attorney if the duly elected State's Attorney is unable to attend to his duties pursuant to 55 ILCS 5/3-9005 a (4) (See App. 37a). The District Court declined to exercise its jurisdiction under 28 U.S.C. 1353 (3) and/or 28 U.S.C. 1654 to obtain proper legal representation of the County by an authorized legal representative. The District Court failed to apply the provisions of 28 U.S.C. 1652 to render a decision on the issue of improper legal representation utilizing the clear and unambiguous provisions of 55 ILCS 5/3-9005 a (4) and 55 ILCS 5/3-9008. Without the proper legal representation in accordance with State law, any judgment entered in favor of the Petitioners could be collaterally challenged as being invalid because of the unauthorized defense representation by a County of Illinois by a private law firm lacking appointment as a "Special State's Attorney" by the Court in which the proceedings were pending. No evidence appears affirmatively in the record showing that any of the attorneys from the law firm of Kiesler and Berman had authority to appear as legal representatives of the County of Will. Although Petitioners caused proper summons to be served upon the Will County Clerk in accordance with state law, as affirmatively appears in the certified docket sheets in the record on appeal, and proper return of service was entered in the record, the record affirmatively shows that the County Board did not authorize the defense representation of the County of Will by passing a resolution or ordinance affirming the legal representation of the County by a "Special State's Attorney," (App.36a, 37a). The Will County Board failed to take actions necessary to defend the County of Will in a legally cognizable form, 55 ILCS 5/1-6003 (App.40a). Without the District Court's

appointment of a Special State's Attorney or its order to the County of Will to appear in a legally cognizable form, the Court should not have entered summary judgment in favor of the County. This failure conflicts with this Court's holding in McDaniel v. Traylor, 196 U.S. 415, 423, 49 L.Ed. 533, 537, 25 Sup. Ct. Rep. 369. Without the District Court's action ordering the County of Will to appear in a legally cognizable form, the Petitioners are deprived of obtaining a non-void, non-voidable judgment which is contrary to the generally recognized principle of finality of judgment. This Court has found that when confronted with such a situation, the proper action should be for the Court to issue an order for the state defendant to appear in "due form" or show cause to the contrary by a specified date or judgment by default would be entered against the state. In Chisholm's Executors v. The State of Georgia (1793), Chief Justice Jay, Justice Wilson, Justice Cushing, and Justice Blair decided in favor of jurisdiction when it appeared that process was properly served as is the situation in the instant case. The Court there issued an order requiring the State of Georgia to appear in "due form" or show cause to the contrary or default would be entered against the State. That case was cited to in another case heard by this Court in The State of New Jersey, Complainant v. The People of the State of New York, 30 U.S. 284. There that Court ordered the defendant State of New York to appear by the representation of the Attorney General from New York State because of New York statutes requiring representation by the Attorney General in his official capacity.

Similarly, this Court has held that 'defendants' cannot be construed as implying any other than the county officers empowered to represent the state, which must result from the command of the statute, that he should defend the suit for and

on behalf of the state, U.X. Gunter, Jr., v. Atlantic Coast Line Railroad Co., 200 U.S. 273, 26 S. Ct. 252.

Petitioners could not convince any Court to exercise their jurisdiction to obtain their in personam jurisdiction over the County of Will in a legally cognizable form by and through a Court order requiring the appearance of an authorized attorney by a date certain or to show cause as this Court had held in The State of New Jersey, Complainant v. The People of the State of New York, 30 U.S. 284.

Only the Federal Courts are feasible for relief to which the Petitioners are entitled. In related and parallel litigation brought against the County of Will in State Court, Petitioner Schneider (12th Judicial Circuit of Will Co., Il. Docket #01 C 633, Schneider v. County of Will et al; Docket 3-02-0501; 3rd App. Dist of Ill.) was unable to get the Courts there to issue an order requiring the County to appear in a legally cognizable form in accordance with law in the pending state court actions.

An FOIA response letter from the Will County Clerk's Office (App. 38a) indicates that the Will Co. Board did not pass a resolution or ordinance employing any private attorney to defend them in the underlying case in accordance with their duties pursuant to 55 ILCS 5/1 6003. It also indicates that David Kiesler took an "Oath of Office as a Special *Assistant* State's Attorney" which was certified on April 17, 2001. This "Oath" could not have applied to the Plaintiffs' case since a) the 55 ILCS 5/3-9008 requires court appointment of a Special State's Attorney and b) the Petitioners had not yet filed this case with the Clerk of the U.S. District Court until April 19, 2001, which was two days after this "Oath" was supposedly taken by David Kiesler (See notary seal, App.38a). Had this been a document relevant to the instant case this "Oath" it would have had to bear a notary seal dated sometime after April 19, 2001.

The certified docket sheets clearly show that the County had been properly served with summons and that summons had been returned. The certified docket sheets clearly show that the duly elected Will County State's Attorney failed to enter his appearance to defend the County of Will. This Court has held that a plaintiff may have a judgment entered in favor of a defendant invalidated when it becomes clear that the defendant had been represented by an attorney having had no authority to represent the defendant as it did in the following cases, Hill v. Mendenhall, 88 U.S. 453, Capron v. Van Noorden, 6 U.S. 126, Employers Reinsurance Corp. v. Bryant, 299 U.S. 374, Ephraim Simon v. Southern Railway Company, 236 U.S. 115, 35 S. Ct. 255.

The transcripts of the District Court's ruling on March 14, 2002 (App.28a) and the letter to the Petitioners from Kiesler and Berman (App.34a) clearly indicate that Will County State's Attorney, Jeff Tomczak, appointed Kiesler and Berman to defend the County of Will. Petitioners believe that they were deprived of due process of law by this failure. The actions and inactions by the Will County Board show that the County of Will's policy on the issue of appearance in Court in a legally cognizable form is clearly and irrefutably contrary to due process procedures under Illinois Statutory mandate and Petitioners have been injured by the deprivation thereby.

The appointment to defend the County of Will by the Will County State's Attorney violated 55 ILC 5/3-9008, which requires appointment by the Court, and Article II Section 1 (App. 38a) of the Illinois Constitution which provides that no branch of government shall exercise those powers designated to be exercised by another branch of government. 55 ILCS 5/3-9005 a (4) does not allow a State's Attorney, the privilege of appointing his duty to defend the County "in his official capacity" to another in a "representational capacity" such as by a private law firm without an appointment of a Special

State's Attorney by the court in which the proceedings are pending. A State's Attorney is a member of the executive branch of Illinois government; People v. Thompson, 43 Ill. Dec. 600, 88 Ill. App. 3d 375, 410 NE. 2d 600, 4th App. Dist, 1980. Thus, this appointment conflicts with Article II Section 1 of the Illinois Constitution and 55 ILCS 5/5 9008.

On appeal, Petitioners filed various pleadings and motions to 1) File a Brief in Excess of 30 pages when it became apparent that many more pages were required to adequately explain to the Court all of the issues for appellate review; 2) Strike the Rule 26.1 Disclosure Statement filed by the law firm of Kiesler and Berman since they were without any authority to represent the County of Will; 3) Request that the Appellate Court treat the Notice of Appeal as a Petition for Mandamus so the Appellate Court would require the County of Will to comply with State Statutes relative to appearance in a legally cognizable form. All of these aforementioned motions and pleadings were denied.

The 7th Circuit's unpublished order affirming the District Court's actions misapprehended that 55 ILCS 5/4-2003 permits a State's Attorney to appoint a "Special State's Attorney" because of a misinterpretation of the statute. (App. 5a) The Appellate Court failed to cite and could not cite any Illinois case law in support of this contention. Conversely, Illinois case law is replete with case law supporting Petitioners' assertion that only the Court in which the proceedings are pending may appoint a "Special State's Attorney" and no decision to the contrary has ever been held by any Court to the Petitioners' knowledge.

The Appellate Court's unpublished affirming order also asserted that Petitioners had suffered no injury or harm personal to them by the failure of the County to appear in a legally cognizable form, since the District Court had found for the Defendant County on summary judgment, and

therefore, the Appellate Court had no Article III jurisdiction to address an appeal in which there was no ongoing case or controversy. (App. 3a). The Appellate Court's decision is in conflict with this Court's holding in Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 118 S.Ct. 1003, which found that a Federal court must address the jurisdiction of the Court before deciding a matter based on the merits. This Court held in Steel City that the Petitioners could not have recovered under any relevant interpretation of the controlling statute in that case. However, the Petitioners had already surmounted that hurdle in the District Court's published order and opinion in the instant case, Schneider v. Will Co. et al., 190 F. Supp. 1082. There the District Court held that the County's 12 b (6) Motion to Dismiss was denied as to the ADA count asserting relief and that the Petitioners could obtain relief upon a showing that Petitioners were discriminated against because of the Will County Board's knowledge of their plans to provide special accommodations for customers with disabilities (App. 22a). Petitioners not only presented evidence that the Will County Board knew of that fact, the Petitioners presented evidence that the floor plan showing the accommodation of people with disabilities was irrefutably in the hands of the individual Will County Board members in advance of their invalid vote that they cast on October 21, 1999 denying the Petitioners' Special Use Permit Application to establish a B&B that accommodated the disabled (App. 33a).

This Court has held that a court cannot determine a cause in favor of the Petitioners without the appearance of the County in a legally cognizable form in accordance with findings in U.X. Gunter, Jr. v. Atlantic Coast Line Railroad, 200 U.S. 273, 26 S. Ct. 252 @ 287.

The Appellate Court's unpublished order affirmed that the District Court acted appropriately in denying Petitioners'

Motion to Disqualify the Law Firm of Kiesler and Berman in its order wherein it was stated that the appointment of a private law firm to defend the County of Will was merely a formal procedure thereby presuming that the District Court would have appointed the law firm of Kiesler and Berman to defend the County. However, this presumption was incorrect. An example is found in another U.S. District Judge's action in Northern Illinois' Eastern Division in the case of Schmude v. Sheahan, 2004 WL 718501. In that case the District Judge informed private lawyers (that had petitioned the District Court to have them appointed as "Special State's Attorneys" to defend various Cook County Officials pursuant to 55 ILCS 5/3-9008), that he would refuse to appoint them if they had been past employees of the Cook County State's Attorneys Office. To circumvent the U.S. District Judge's unwillingness to appoint them as Special State's Attorneys, the private lawyers applied for appointment to a Cook County Circuit Judge and received an appointment to defend the Cook County Officials. This example is just one of many reasons that a judge may find relevant for refusing to appoint a private lawyer to defend County Officials or a County. The Appellate Court did not correctly presume that the appointment of the private law firm of Kiesler and Berman was mere formality. The determination of whether to appoint was entirely within the discretion of the presiding Judge in which the proceedings were pending and any ruling depended upon the reasons for the request for an appointment and would have been subject to objections and challenges from the Petitioners. However, because the County of Will failed to ask the Court to appoint a Special State's Attorney, the Petitioners could not object since no reasons for the appointment were provided to them or the Court. Thus, the only Motion that could have been brought by the Petitioners in the U.S. District Court was their timely made Motion to Disqualify. Because the Motion to Disqualify was denied by the U.S. District Court's refusal to

exercise its jurisdiction, there is no basis in this case for affirming the holdings of those courts pursuant to 28 U.S.C. 1652.

Should this Court find that the County of Will failed to appear in Court in a legally cognizable form, all rulings and pleadings are void actions because of the unauthorized representation by a private law firm. All pleadings should be expunged from the record so as not to allow for any collateral attack asserted by the County of Will to challenge any judgment in favor of the Petitioners on a theory of unauthorized representation by the Will County Board for the legal defense of the County of Will by a private law firm.

II. The District Court Should Not be Allowed to Abdicate Its Statutory Duties to Exercise Its Jurisdictional Authority over Claims Not Subject to Ripeness.

The District Court's Due Process analysis (App.22a) asserted that other relief was not capable in the U.S. District Court because of this Court's rulings in Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172, 105 S. Ct. 3108. However, the rules of ripeness were inapplicable to the facts of the present case because injunctive relief was appropriate pursuant to Petitioners' Rule #59 Motion to Alter or Amend the Judgment in the form of 42 U.S.C. 1983 relief by Declaratory Judgment invalidating the vote cast by the Board on October 21, 1999, because of the Will County Board's failure to provide a pre-deprivation hearing pursuant to Petitioners' timely filed Notice of Appeal and 55 ILCS 5/5 12011 and 12012 as well as this Court's holding in City of Chicago v. International College of Podiatric Surgeons, 522 U.S. 156, 118 S. Ct. 523.

The District Court has jurisdictional authority pursuant to 28 U.S.C. 1343 (3) to sit in determination of Petitioners' claims for relief under 42 U.S.C. 1983. The U.S. Supreme Court has held that an ordinance that violates the equal

protection clause of the XIV Amendment to the U.S. Constitution on its face is not subject to a ripeness standard requiring determination in State Court before being brought in Federal Court, New Orleans Public Service, Inc. v. Council of City of New Orleans, 491 U.S. 350, 372, 109 S. Ct. 2506, 2520-2521, 105 L.Ed. 2d 298, (1989).

Additionally, the Williamson Court applied a ripeness analysis only to authorized zoning decisions, which is not the situation in the instant case. Firstly, in Williamson, the zoning authority had authority to decide the case, which, under Tennessee law, was subject to judicial review. Conversely, in the instant case the County of Will did not have authority to vote on the Special Use Permit Application on October 21, 1999 because of the County's failure to conduct a pre-deprivation hearing to Petitioners' timely filed Notice of Appeal that was filed prior to the County Board's vote to deny Plaintiffs' B&B permit.

While the governing body in Williamson was authorized to render their decision, the County of Will was not authorized to render a decision because it failed to stay their October 21, 1999 vote and provide for a hearing on Petitioners' timely filed Notice of Appeal. Petitioners asked the District Court to Alter or Amend Its Grant of Summary Judgment in favor of the County by Petitioners Rule #59 Motion to Alter or Amend the Judgment which stated the fact that the County was unauthorized to cast a final vote on October 21, 1999. The Petitioners furnished the Court with certified documentation from the Will County Clerk showing that the Notice of Appeal was filed in advance of the vote on October 21, 1999. The vote should have been "stayed" in accordance with 55 ILCS 5/5 12011, but, it wasn't. Under Illinois law, a vote cast without following due process procedures may be invalidated since it is void because it was made without authority to do so. The record on appeal

showed sworn deposition testimony from one of the neighbors in attendance of the public hearing that the Will County Planning and Zoning Commission (WCPZC) "railroaded" the Petitioners and that the public hearing was a farce because the chairman disallowed neighbors at the hearing willing to testify favorably to the proposed B&B from testifying. This continued with the WCPZC's deprivation to a hearing on Petitioners' timely filed Notice of Appeal in violation of 55 ILCS 5/5 12011 and 12012.

The County of Will was additionally without authority to enact their B&B Ordinance under both the Illinois' Special Use Permit Act, 55 ILCS 5/5 12009.5, in the form in which it was enacted because it failed to establish a B&B as a use as of right (a permitted use) before establishing the use as a "special use."

In addition to the foregoing, the County of Will exceeded its legitimate authority in their enactment of the County's B&B Ordinance as expressed in Dillon's Rule as incorporated in the Illinois Constitution Article VII, Section 7. This requires that the County may not exercise any powers other that those conferred to the County by the Illinois Constitution, by State Statute, or those necessarily implied to enforce those powers given. The Illinois Supreme Court has stated that Will County is a non-home rule county, Commonwealth Edison v. Will County Collector, 119 Ill. 2d, 25 Ill. Dec. 482, Ill. S. Ct., (2001).

Still yet, the County's B&B Ordinance deprives the Petitioners of their fundamental right to engage in occupations common to the community which were established by the State of Illinois' B&B Act, 50 ILCS 820. This conflicts with this Court's holdings in Yick Wo (supra)

The State B&B Act, 50 ILCS 820 did not authorize the County to locate a B&B in a site specific locale and it did not authorize the County to prohibit certain people situated in a

residential home from applying for licensing for a B&B while allowing others similarly situated in a residential home to apply.

Furthermore, the State B&B Act 50 ILCS 820 provided that the County was only authorized to "provide for regulation" it did not authorize the County to remove certain express regulations provided for in the State statute that gave certain rights to the public to apply for licensing based solely on whether the proposed B&B was located in a single family home. The overall tenor of the State B&B Act was for the County to provide licensing and enforcement of the regulations expressed in the State statute.

The District Court's rulings disallowed any 42 U.S.C. 1983 relief authorized by law to invalidate the County's B&B Ordinance pursuant to the claims made by the Petitioners that the Ordinance violated State laws as well as violated the equal protection clause of the XIV Amendment to the U.S. Constitution. This conflicted with this Court's holdings in New Orleans (supra), which held that a challenge to a zoning ordinance that was facially unconstitutional was not subject to ripeness. Invalidation of the County's Ordinance would have allowed the Petitioners to apply for the licensing mandated under the express provisions given by the State of Illinois' B&B Act. The County's Ordinance does not operate equally between all people similarly situated and is unconstitutional on its face because the Ordinance only allowed people in residences with minimum acreages to establish a B&B when the State of Illinois B&B Act allowed any person in a residence to apply for licensing for a B&B Act. The State of Illinois' B&B Act did not authorize the County to enact a zoning based ordinance applicable to the establishment of B&Bs in certain residential zones while disallowing others in residential zones from applying for B&B licensing. The County of Will enacted their invalid B&B Ordinance solely to

stop the Petitioners' B&B from being established. Evidence and testimony in the Record on Appeal clearly shows a deliberate deprivation to Petitioners' civil liberties and property rights.

Petitioners were entitled to have the vote cast by the Will County Board on October 21, 1999 invalidated because of the Petitioners timely filed Notice of Appeal that, according to State Statute, "stays" all further proceedings. 55 ILCS 5/5 12011 provides that all proceedings are "stayed" when a timely filed Notice of Appeal is filed. Petitioners' attorney fully informed the County Board's chairwoman of the Land Use Committee of the timely filed Notice of Appeal but she decided to ignore the clear provisions of 55 ILCS 5/5 12011 as well as the County Zoning Ordinance, 14.9-3, that mandates that a "stay" of all further proceedings (including a vote on the special use permit application) pursuant to a timely filed Notice of Appeal. Petitioners were entitled to the hearing on their timely filed Notice of Appeal pursuant to 55 ILCS 5/5 12012 (App. 40a) and were deprived of the hearing.

No Illinois Circuit Court could have obtained jurisdiction over any filing by the Petitioners in the Will County Circuit Court because a court's review of an administrative decision (pursuant to the Petitioners' Notice of Appeal) is not possible under the Illinois Administrative Review Law's (735 ILCS 5/3-101 et seq.) until a final written "decision" entered by the Zoning Board of Appeals, which, in Will County the Zoning Board of Appeals is comprised of the members of the Will County Planning and Zoning Commission pursuant to 14.4-1. Again the WCPZC deprived the Petitioners of the Appeal hearing because it did not want to confer jurisdiction to the Will County Circuit Court for judicial review pursuant to 735 ILCS 5/3-101. Petitioners submitted to the Court certified documentation submitted as exhibits with their Motion to Amend or Alter the Judgment to the District Court, proved

beyond any doubt that the Notice of Appeal was timely filed with the Clerk of Will Co. and that the vote cast by the Will Co. Board was invalid as a result. Petitioners only practical remedy for relief, assuming arguendo that the County's B&B Ordinance was a valid enactment (which it wasn't), was to apply to a Court of competent jurisdiction for declaratory judgment requiring the Will County Planning and Zoning Commission to conduct the hearing required by 55 ILCS 5/5 12012 on the issues included in Petitioners' Notice of Appeal. Petitioners did apply to a Federal District Court of competent jurisdiction under 28 U.S.C. 1343 (3). The District Court had decided that Petitioners' complaint had stated a prime facie case for relief under the ADA (App. 22a). However, the District Court declined to grant Petitioners' Motion to Alter or Amend the Judgment pursuant to the relief Petitioners were entitled to.

Petitioners' Motion to Amend and Alter the Judgment pursuant to Federal Rule of Civil Procedure #59 that was presented to the District Court had attached exhibits from the Will County Clerk by way of certified documents that irrefutably showed that the Notice of Appeal was filed prior to the County Board's vote cast on October 21, 1999. As stated above, pursuant to both Illinois Statute and Will County Ordinance, the vote cast by the Will County Board should have been stayed when the Petitioners' attorney fully informed and proved the existence of the timely filed Notice of Appeal to the chairwoman of the Will County Land Use Committee. The chairwoman declined to stay the vote, presented the application to the County Board for its vote, and, just like clockwork, the County Board entered a 21-0 vote to deny Petitioners' special use permit application to establish a B&B.

Subsequently, without comment, the District Court refused to Alter or Amend its Judgment by invalidating the

vote cast by the Will County Board on October 21, 1999 and enter a Declaratory Judgment in favor of the Plaintiffs and remand to the Will County Planning and Zoning Commission for their conduct of the hearing to which the Petitioners were entitled.

Petitioners have asserted every available means of relief to which they were entitled but all were denied by the District Court. Williamson ripeness was not applicable to the fact situation of this case because the Will County Planning and Zoning Commission refused to schedule a hearing mandated by 55 ILCS 5/5 12012 on the issues that were established in Petitioners' timely filed Notice of Appeal. The Notice of Appeal challenged a ruling made by the Will County Chief Zoning Enforcement Officer in the spring of 1999 when Petitioners applied for a Special Use Permit that held that Petitioners could establish (4) B&B guestrooms in the barn on the property while Petitioners lived in the farmhouse. After Petitioners had removed objections filed by the City of Joliet's Economic Development Director and the Will County Health Dept., someone must have brought pressure to bear on the Chief Zoning Enforcement Officer to reverse his ruling on the ability of the guestrooms to be located in the barn under a convoluted re-interpretation of the language of the County's B&B Ordinance. This re-interpretation and reversal of the ruling upon which the Petitioners had relied in submitting their Special Use Permit Application, was made on September 17, 1999. Petitioners timely filed a Notice of Appeal on October 21, 1999 within the 35 day limitation imposed in the State Administrative Review Law. That law requires a written final decision from the Zoning Board of Appeals from the County. No written final decision to the issues on appeal was issued. Petitioners' issues in the Notice of Appeal were not scheduled for a hearing in accordance with 55 ILCS 5/5 12012, despite numerous letters and phone calls as well as a

certified letter mailed to the chairwoman of the Will Co. Land Use Committee. All were ignored.

Petitioners assert that the so-called zoning decision should not have been made. The County jumped the gun in their eagerness to deny the Petitioners Special Use Permit Application to establish the B&B. They had failed to follow proper procedure as mandated by State Statute, 55 ILCS 5/5 12011 and 12012. Thus, it was the County's vote that was not ripe for a vote and must be invalidated for having failed to follow express procedures mandated by State Statute.

Additional authority with detailed analysis on the issue of relief pursuant to 42 U.S.C. 1983 supporting Petitioners' assertion of entitlement to relief is found in Baumgardner v. Cook, 108 F. Supp. 2d 1041 which analyzes 42 U.S.C. 12201 (b).

By invalidating the County's B&B Ordinance, the Petitioners are then free to apply for a B&B license from the County as the State of Illinois' B&B Act, 50 ILCS 820, has mandated.

Another compelling reason why the Petitioners are entitled to relief is founded in equity. After the Petitioners inquired with Will County zoning officials about the ability of the subject property as one being capable of establishing a B&B, did the County of Will enact a B&B Ordinance that deprived Petitioners of their fundamental right to apply for the licensing for the B&B under the licensing scheme established by the State of Illinois' B&B Act. Petitioners contacted Will County Zoning Officials inquiring whether they would be able to establish a B&B if they were to purchase the property. County Officials responded in a voicemail message that the County would enact an ordinance that would allow the Petitioners to establish their B&B as of right. The text is as follows:

Mr. Schneider, this is David with the Will Co. Land Use Department. You were in two days ago and I did check on ...about the bed and breakfast. Umm..at this time bed and breakfasts are not permitted in any zoning district. However, there are proposed amendments to the zoning ordinance, which are tentatively scheduled to go to the County Board next month. Umm, in those zoning districts, Umm...er, the Bed and Breakfast will be umm...ummm included within the "R" or residential zoning districts. Umm, if you have any questions please give me a call at 815/ 727-8430 and I can explain this in greater detail. Thank You. (Record on Appeal, Plaintiffs Motion to Amend the Complaint, Doc. 28 p.10)

After the Petitioners purchased the property, the County enacted the ordinance in a form that violated the State of Illinois' Special Use Permit Act, 55 ILCS 5/5 12009.5, since it only allowed the establishment of the B&B in (4) of the residential zoning districts by applying for a special use permit. The B&B Ordinance did not allow the establishment of a B&B as of right in any "R" residential zoning district, which is the zoning district where the Petitioners farmhouse is located. This violated the clear provisions of 12009.5 which requires a zoning use to be established in one or more zoning district before being established as a special use.

Petitioners asked for a ruling from the Chief Zoning Enforcement Officer as to whether the County's B&B Ordinance would allow the Petitioners to live in the farmhouse while allowing the (4) guestrooms to be located in the barn that was situated in the A-2 zoning district, which, according to the County's B&B Ordinance was one of the zoning districts in which one could apply for a Special Use Permit to establish a B&B. The Chief Zoning Enforcement Officer assured the Petitioners that the County B&B

Ordinance's language would allow the establishment of (4) guestrooms in the converted barn while the Petitioners resided in the farmhouse. Some 4 months later the Chief Zoning Enforcement Officer would completely reverse this May of 1999 ruling on September 17, 1999 when it became clear that the railroading Petitioners had been receiving from the Will County Health Dept. was going to fail due to the intervention of the Illinois Dept. of Health in the state capitol. This reversal of where the guestrooms could be established, whether in the converted barn or in the farmhouse, was cited as a material reason in the County's Motion for Summary Judgment. Importantly, the State of Illinois' B&B Act, 50 ILCS 820-2 (b) (App. 41a) clearly allows an owner or owner's agent to reside in contiguous property adjacent to the structure in which the guestrooms are located. The Chief Zoning Enforcement Officer was pressured from someone to reverse his prior May of 1999 ruling upon which the Petitioners relied when they submitted their Special Use Permit Application to establish the (4) guestrooms in the converted barn.

Relief granted under any of the foregoing avenues available for relief will ameliorate the effects of traveling disabled people in the Will Co. area who are seeking accommodations in a disabled accommodating B&B home.

III. Article III Jurisdiction is Clearly Shown by the Facts in this Case.

There is a presumption of harm arising from the existence of an error committed by a trial Court against the party complaining, and only in cases where the absence of harm is clearly shown from the record that the commission of such an error against a party seeking to review it is not cause for reversal of the judgment, Deery v. Cray, 5 Wall. 795, 807, 18 L. Ed. 653.

The U.S. Supreme Court has held that if a plaintiff can show an injury in fact, causation of that injury by the Defendants complained of conduct, and a likelihood that the requested relief will redress the injury, a justiciable case or controversy exists, Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S. Ct. 2130, 2136, 119 L.Ed. 2d 351.

Herein, Petitioners have conclusively shown that they have been deprived of the rights to apply for licensing under the Illinois B&B Act, 50 ILCS 820 by the County of Will's enactment of an ultra vires, facially unconstitutional B&B Ordinance that the County had been given no authority to enact.

Petitioners were deprived of a pre-vote hearing on the issues included in their Notice of Appeal and were therefore denied the final decision necessary to apply to the Circuit Court of Will Co. for judicial review under the Administrative Review Law.

Petitioners took a complaint to the U.S. District Court and alleged that the Will County B&B Ordinance was unconstitutional on its face on an equal protection basis, ultra vires, and unconstitutional as applied.

The U.S. District Court held that if the Petitioners could prove that they were going to accommodate the disabled and handicapped with (2) guestrooms that would be sufficient to confer standing under the ADA. Petitioners submitted the required proof (App. 33a) in their Response to the County's Motion for Summary Judgment.

In response to the single issue of the invalid legal representation of the County by unauthorized legal counsel, the Appellate Court affirmed the District Court's ruling made on March 14, 2002. That ruling denied Petitioners' Motion to Disqualify the private law firm invalidly representing the County and simultaneously took jurisdiction over the ADA claim. Thus, the ongoing case or controversy was established.

Petitioners tried to assert other claims on appeal but, the Appellate Court denied the Motion to Exceed the 30 page limitation on the size of the Appellant's Brief.

The Petitioners asserted on appeal that it was the duty of the County Board pursuant to 55 ILCS 5/1-6003 to take the necessary actions to appear in a legally cognizable form in accordance with 55 ILCS 5/5 9008 and the County Board failed in that duty.

Petitioners cannot reasonably be said to have failed to have an ongoing case and controversy or cannot be said to have not sustained an injury personal to them.

This Court has held that a Court must determine its jurisdiction in the elemental sense of jurisdiction over the parties, jurisdiction over the subject matter and jurisdiction to render the particular judgment sought before exercising hypothetical jurisdiction and determine a case based on the merits, Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 118 S. Ct. 1003. The District and Appellate Courts never had jurisdiction over the County of Will in a legally cognizable form. As such, this Court has held that it is improper to proceed any farther in a case until such jurisdiction is obtained, (Employers Reinsurance Corp. supra @ 382). Thus, the District and Appellate Courts may be found to have failed to properly apply the decisions made by this Court in Steel City (supra).

Should this Court find that the County failed to appear in a legally cognizable form, all pleadings by unauthorized legal counsel of the County are a legal nullity because the court had no power to proceed to an adjudication, Employers supra @381, and may be attacked collaterally, Galpin v. Page, 85 U.S. 350 @ 356.

Lastly, mandamus may be proper since this Court has held that mandamus may be appropriate to compel an inferior court to exercise its prescribed jurisdiction or to compel it to

exercise its authority when it is its duty to do so, Will v. Calvert Fire Ins. Co, 437 U.S. 655, 661, 98 S. Ct. 2552, 57b L.Ed. 2d 504.

CONCLUSION

Because of the foregoing reasons, Plaintiffs request that the Court grant the Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

B. Michael Schneider
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815/485-8973 (h)
pro se

Janine L. Bally
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July 22, 2005

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 04-2058

[February 23, 2005]

B. MICHAEL SCHNEIDER)
and JANINE L. BALLY,)
Plaintiffs-Appellants,)
)
v.)
)
COUNTY OF WILL, STATE)
OF ILLINOIS, etc., et al.,)
Defendants-Appellees.)
)

JUDGES: Before Hon. WILLIAM J. BAUER, Circuit Judge, Hon. DIANE P. WOOD, Circuit Judge, Hon. ANN CLAIRE WILLIAMS, Circuit Judge.

ORDER

On consideration of the petition for rehearing and rehearing en banc filed by *pro se* plaintiffs-appellants on February 4, 2005, no judge in regular active service has requested a vote on rehearing en banc, and all members of the

original panel have voted to DENY the petition for rehearing. Accordingly,

IT IS ORDERED that the petition for rehearing be, and the same is hereby, DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 04-2058

[January 21, 2005]

B. MICHAEL SCHNEIDER and JANINE L. BALLY, Plaintiffs-Appellants,

v.

COUNTY OF WILL, a municipal corporation, et. al., Defendants-Appellees.

Before Hon. WILLIAM J. BAUER, Circuit Judge, Hon. DIANE P. WOOD, Circuit Judge, Hon ANN CLAIRE WILLIAMS, Circuit Judge.

ORDER

This appeal arises from a zoning and permit dispute between the County of Will, Illinois, and would-be owners of a bed-and-breakfast establishment. Janine Bally purchased property within the county in 1999; she intended to lease it to Michael Schneider for use as a bed-and-breakfast. Before

buying the property, Bally allegedly received assurances from various county officials that the Will County Board and its subordinate Planning and Zoning Commission and Land Use Committee would take the steps necessary to allow operation of the bed-and-breakfast. For reasons not at issue in this appeal, this never happened. Disappointed, Schneider and Bally filed a *pro se* complaint in federal district court against the County of Will and twelve members of the Will County Board in their official capacities, alleging that the Board's denial of permits for the bed-and-breakfast violated the Fair Housing Act, the Americans with Disabilities Act, and their constitutional due process and equal protection rights. During the course of the action, Schneider and Bally argued orally and in motions to the district court that the County of Will should be treated as if it had failed to appear, because it was represented by the private law firm of Kiesler & Berman, as opposed to the state's attorney for the County. Kiesler & Berman continues to represent the County in this appeal. The district court denied their motion to disqualify the firm and later granted summary judgment for the County and its board members.

On appeal Schneider and Bally do not address the district court's grant of summary judgment on the merits. Instead, they argue only that the district court should have granted their motion to disqualify the private firm and to appoint a special state's attorney to act in its place. This argument is based on their claim that the Will County state's attorney did not comply with the Illinois state statute that governs the appointment of special state's attorneys when he appointed the firm. See 55 ILCS 5/3-9008 (describing the power of courts to appoint special state's attorneys).

Typically, Illinois counties are represented in court by a state's attorney who has the duty "to defend all actions and

proceedings brought against his county, or against any county or State officer, in his official capacity, within his county." 55 ILCS 5/3-9005(a)(4). The state's attorney is an elected official who coordinates and oversees the legal affairs of the county; he or she is not expected personally to attend to each case. One tool that the law provides to enable the state's attorney to carry out this responsibility is the authority to appoint assistant state's attorneys when authorized by the county board. 55 ILCS 5/4-2003. Another statute, ILCS 5/3-9006, confers on the state's attorneys the power to "control the internal operations of [the] office and procure the necessary equipment, materials and *services* to perform the duties of [the] office" (emphasis added). We need not resolve whether this authority is broad enough to empower a state's attorney to contract for legal services outside the context of 5/4-2003, as long as there is money in the budget for this purpose. Nor need we comment on whether the county board must authorize the employment of assistant state's attorneys one at a time, or whether it may (through appropriations) give advance authority. These questions, while perhaps interesting, are beside the point here, because Schneider and Bally's case runs into another insurmountable obstacle.

As we noted, Schneider and Bally take the position that Kiesler & Berman was not authorized to represent the County in this case, because only a court has the ability appoint a special state's attorney, see 55 ILCS 5/3-9008, and no court has done so. But regardless of whether Will County followed the proper state procedures for appointing Kiesler & Berman, Schneider and Bally do not have standing to disqualify the firm in the context of this federal lawsuit. See *O'Connor v. Jones*, 946 F.2d 1395, 1399-1400 (8th Cir. 1991) (no standing for prisoner seeking to disqualify private law firms hired as special assistant attorneys general). Schneider and

Bally cannot show that the private law firm's representation of the County harmed them in any way.

The lack of any injury personal to them is fatal to their standing here. See *Elk Grove Unified School Dist. v. Newdow,* 542 U.S. 1, 159 L. Ed. 2d 98, 124 S. Ct. 2301, 2308 (2004) ("In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." (quoting *Warth v. Seldin,* 422 U.S. 490, 498, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975)); see also *Murchison v. Kirby,* 201 F. Supp. 122, 123 (S.D.N.Y. 1961) ("This is rather a strange procedure in that the moving party seeks not a definitive relief in connection with the action to which he is a party, but rather the collateral relief of depriving plaintiffs of their counsel."). The district court properly denied Schneider and Bally's motion. Moreover, even if they could somehow surmount the standing obstacle, the consequence would not have been a conclusion that the County had never appeared at all; it would simply have been an order by the court to substitute counsel.

Because of our resolution of this case, we DENY as moot the County's motion to strike the appellant's reply brief.

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

No. 01 C 2779

[March 14, 2002]

B. MICHAEL SCHNEIDER and JANINE L. BALLY, Plaintiffs-Appellants,	)
v.	)
COUNTY OF WILL, a municipal corporation, et. al., Defendants-Appellees.	)

MEMORANDUM OPINION AND ORDER

This four count complaint was filed pro se, by B. Michael Schneider ("Schneider") and Janine L. Bally ("Bally") against Will County, Illinois and twenty-three members of the Will County Board in their official capacities. The complaint alleges that, in denying plaintiffs a special use permit and failing to rule on their remodeling permit for the creation of a bed and breakfast near a veteran's cemetery, the defendants

have violated the Fair Housing Act of 1989, 42 U.S.C. § 3601, et seq. (FHA) and the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq. (ADA), and have denied plaintiffs of their constitutional due process and equal protection rights. U.S. Const. Amends. 5, 14.

Defendants have filed a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6). For the purposes of the motion, the court accepts the factual allegations of the complaint as true and draws all reasonable inferences in favor of the plaintiff. *See Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1428 (7th Cir. 1996). The facts alleged by plaintiffs are set forth below.

Factual Background

On March 17, 1999, Bally purchased the property at 1200 Old New Lenox Road, in Joliet, Illinois out of foreclosure from the Veterans Administration, in anticipation of building and operating a bed and breakfast there. When the property was purchased, on it stood a three bedroom farmhouse zoned R-4 residential, and a detached barn, zoned A-2 agricultural.

Plaintiff Schneider is the intended lessee of the land. He planned to operate the bed and breakfast, paying Bally $1,200 a month in rent, plus half of the operating profits. Additionally, Schneider and Bally agreed that Schneider would remodel both structures, which they apparently needed, because in July 1999, the Will County Building Department deemed the farmhouse unfit for occupancy. The bed and breakfast was to have two of its five planned rooms be handicapped-accessible.

Plaintiffs allege that they bought the land relying on an interpretation of a Will County ordinance, specifically

allowing the operator of a bed and breakfast to live on contiguous property rather than in the bed and breakfast itself, and allowing for a maximum of five bedrooms in the bed and breakfast. This interpretation was later "reversed" by apparently another official interpretation of the same ordinance, requiring that an operator live on the bed and breakfast premises. In any event, in July 1999, plaintiffs filed for a rehabilitation permit and a special use permit, which are the subject of this litigation. The Will County Building Department refused to complete the processing of plaintiffs' remodeling permit application in August 1999, and as far as this court is aware, it has yet to be processed. Plaintiffs have sought an injunction in Illinois Circuit Court to compel issuance of the remodeling permit.

On August 3, 1999, Schneider appeared before the Will County Planning and Zoning Commission at a public fact finding hearing on plaintiffs' application for a special use permit. Schneider provided the Commission with an endorsement petition signed by the neighbors adjacent to the east, as well as those directly across the street. Two neighbors also appeared that day to offer testimony supporting plaintiffs' application. However, the Committee chairman allegedly allowed only those in opposition to speak. Indeed, one County Commissioner attempted to propose a formal motion in favor of the proposed bed and breakfast with amendments, but was not allowed to speak, either. Plaintiffs allege that they were not allowed to cross-examine those who opposed granting the permit. Plaintiffs also complain that no evidence was presented that showed or implied a possible detrimental effect on neighboring property owners. Those in opposition argued that granting the permit for the proposed bed and breakfast would effect an increase in crime, a decrease in property values, an increase in taxes and an overall danger to the community. The members of the Will County Planning and

Zoning Commission voted unanimously to deny the special use permit.

The Will County Land Use Committee conducted a hearing to review the factual findings from the August 3, 1999, hearing. The committee found no error. The Committee's determination was based on the opinions of an attorney apparently hired by neighbors who opposed plaintiffs' bed and breakfast. Plaintiffs complain that the attorney's findings were not based on fact, but on the concerns of "panicked neighborhood residents."

Plaintiffs appealed the committee's findings by filing an allegedly timely notice of appeal with the Will County Clerk on October 21, 1999. The Will County Board considered the appeal one hour later and unanimously voted to deny the permit. Plaintiffs allege that because the appeal was considered so quickly they did not have time to put together their case. Their argument to the Will County Board would have included outlining the benefits that two handicapped-accessible rooms would have conferred to persons with disabilities. In their last attempt to appeal the denial of the special use permit, plaintiffs sent a certified letter to the Chairwoman of the Land Use Committee requesting that she schedule a hearing of the appeal before the Land Use Committee or the Will County Board, but have never received a response.

Count I -- Fair Housing Act

Plaintiffs first claim that they are entitled to relief under the Fair Housing Act ("FHA"), 42 U.S.C. § 3604, et seq., alleging that the denial of their application for a special use permit was "invidious on the rights of the handicapped and

disabled to obtain alternative temporary lodging in a bed and breakfast establishment." The FHA makes it unlawful:

> to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of -- (A) that person; or (B) a person intending to reside in that dwelling after it is sold, rented or made available; or (C) any person associated with that person.

42 U.S.C. § 3604(f)(2)(A) through (C). Defendants correctly point out that, to receive protection from this section of the FHA, plaintiff's proposed bed and breakfast must fall within the statutory definition of "dwelling." 42 U.S.C. § 3602(b) provides that:

> "Dwelling" means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

In the instant case, plaintiffs planned to have a two-building bed and breakfast. Their farmhouse was to be used as a residence for Schneider, and the barn was to be used as the customer portion of the bed and breakfast.

Defendants correctly contend that because the configuration of plaintiffs' proposed bed and breakfast does not qualify as a "dwelling," even if there was a discriminatory purpose in denying the permit the structure does not fall within the FHA. Whether a building is a

"dwelling" depends on the length a person stays at a residence, and whether that person intends to return to the home. *Lauer Farms. Inc. v. Waushara Cty. Bd. of Adjustment*, 986 F. Supp. 544, 559 (E.D. Wis. 1997). *Lauer* found housing for migrant workers within the definition of "dwelling" because the workers lived in the housing for four to five months at a time, and because this housing was the type that they would "return to" every night.

The often-cited *Patel v. Holley House Motels*, 483 F. Supp. 374 (S.D. Ala. 1979), considered whether a hotel fell within the definition of dwelling. It defined "dwelling" as a "temporary or permanent dwelling place, abode or habitation to which one intends to return, as distinguished from a place of temporary sojourn or transient visit." *Id.* at 381. *Patel* found that a hotel was not within the FHA definition of "dwelling" because there were no plaintiffs who intended to reside in the hotel. *Id.*

The proposed bed and breakfast does not fit within the FHA definition of "dwelling." First, it is highly unlikely that any customers of the bed and breakfast would "intend to return," as the migrant workers did in the *Lauer Farms* case because of the transient nature of a bed and breakfast. Occupants do not generally stay at bed and breakfasts for months at a time. Second, bed and breakfasts are akin to hotels in that they are places of "temporary sojourn or transient visit." Indeed, plaintiffs allege in their complaint that the denial of the special use permit would deprive handicapped visitors of "temporary lodging." Because the building in question does not fall within the FHA definition of "dwelling," plaintiffs' FHA claim fails and defendants' motion to dismiss is granted with respect to Count I.

Count II -- Americans with Disabilities Act Claim

Plaintiffs have also invoked the ADA, claiming that the Will County Board denied their special use permit because their bed and breakfast plans included two handicapped-accessible rooms. Only one handicapped accessible room is required by law for this size establishment. See 28 C.F.R. Part 36, App. A, § 9.1.2. Congress' overall purpose in enacting the ADA was to "establish a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Title I of the ADA aims to stop employment discrimination, Title II prohibits discrimination by public entities, and Title III was enacted to stop discrimination by private entities that provide public accommodations and services. 42 U.S.C. §§ 12111, 12132, 12181, *et seq*. Since plaintiffs allege that the Will County Board, a public entity, unlawfully discriminated against them, they bring their claim under Title II.

Title II of the ADA states that, "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C.§ 12132. Defendants argue that plaintiffs are too remote from those customers with whom they claim to be associated because they are potential customers, rather than specific, qualified individuals with disabilities. Thus, defendants challenge plaintiffs standing to bring this claim, arguing that they are attempting to assert the legal rights of others.

Standing refers to the limitations on whether federal courts *may* and *should* hear cases. Article III constitutional standing

precludes courts from adjudicating cases where there is no actual case or controversy. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). Defendants do not contest plaintiffs' Article III standing. Even if the court *may* hear a case, judicially imposed prudential limitations exist to help courts decide whether they *should* exercise jurisdiction. *Allen v. Wright*, 468 U.S. 737, 751, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984). These constraints include "the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Id.* "Persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others." *Warth v. Seldin*, 422 U.S. 490, 522, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1970). Therefore, if plaintiffs' ADA claim falls within the zone of interest that Title II was intended to protect, they have standing to bring the claim.

Title I of the ADA makes it unlawful for an individual or entity to "exclude[] or otherwise deny[] equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association." 12112(b)(4). Similarly, Title III states that "it shall be discriminatory to exclude or otherwise deny equal goods, services, facilities, privileges, advantages, accommodations, or other opportunities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association." 42 U.S.C. § 12182(b)(2). These sections have come to be known as "association provisions."

Congress did not include an association provision in Title II, however. Congress instead deferred the task of writing regulations implementing Title II to the Department of Justice, with instructions that "Title II should be read to incorporate provisions of Titles I and III which are not inconsistent with the regulations implementing Section 504 of the Rehabilitation Act of 1973, such as Section 102(b)(4) of the ADA [codified as 42 U.S.C. 12112(b)(4), (quoted supra)]." H.R. Report No. 101-485(III), 101st Cong., 2nd Sess. 51 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 474. Congressional reference to the exact regulation in question is proof enough of its intent to include such a provision. *Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37, 47-48 (2d Cir. 1997). Indeed, the regulations implementing Title II's association provision take the language of 42 U.S.C. § 12112(b)(4) directly:

> A public entity shall not exclude or otherwise deny equal services, programs, or activities to an individual or entity because of the *known* disability of an individual with whom the individual or entity is *known* to have a relationship or association. [28 C.F.R. § 35.130(g)(emphasis added).]

Defendants' argument appears to question whether plaintiffs fall within the meaning of the word "known" as it appears in the regulation. The first use of "known" in the regulation means that the defendant must know that there is someone with whom the plaintiff is associated who has a disability. The second use refers to the extent to which a defendant must be aware of the association between the plaintiff and the qualified individual with a disability. With respect to the first use of "known," defendants argue that a plaintiff must identify a *specific person* with a *specific*

disability in order to satisfy the requirement imposed by the first use of "known."

In support of this contention, defendants cite *Oak Ridge Care Ctr. Inc. v. Racine County*, 896 F. Supp. 867, 872 (E.D. Wis. 1995), where a drug and alcohol rehabilitation center whose sale of land was allegedly and unlawfully torpedoed because of its clientele with disabilities was held to have standing. Defendants attempt to distinguish Oak Ridge from the instant case because the rehabilitation center had an existing clientele. Certainly this is a reasonable distinction, but it is not dispositive of this case. Indeed, trial courts within this Circuit have held that the regulation also protects the known association between a proposed business and its targeted customers. *Discovery House, Inc. v. Consolidated City of Indianapolis*, 43 F. Supp. 2d 997 (N.D. Ind. 1999). Discovery House held that a proposed drug rehabilitation center may state a claim of discrimination under Title II's association provision even though a significant portion of the potential customers would not be qualified individuals with disabilities under the ADA. *Id.* at 1002. Thus, a plaintiff may state a claim under the ADA's association provisions based on his association with prospective customers with disabilities in cases where there is a logical relationship between the proposed business and customers with disabilities.

Defendants fail to cite any authority limiting association provisions from covering this type of discrimination. The most analogous cases this court has found barred individuals who alleged that they were discriminated against because of their advocacy on behalf of individuals with disabilities. *Freilich v. Board of Directors of Upper Chesapeake Health, Inc.*, 142 F. Supp. 2d 679 (D. Md. 2001); *Oliveras-Sifre v. Puerto Rico Dept. of Health*, 214 F.3d 23 (1st Cir. 2000). However, *Freilich* and *Oliveras-Sifre* are distinguished from

the instant case because the plaintiffs in those cases were seeking protection under the ADA based on an alleged "association" with a class of people with disabilities for whom they were advocating. There was no actual or even proposed relationship between the plaintiffs-advocates and the intended beneficiaries of their advocacy. In the instant case, as in Discovery House, although there was no current relationship or association between the plaintiffs and the individuals with disabilities that they intended to serve, there was an intended, prospective, actual commercial relationship between the plaintiffs and the individuals who they intended to serve as customers or clients that constituted the alleged motivation for the discrimination. Put another way, it was the plaintiffs' known, intended association with individuals with disabilities that formed the basis of the alleged discriminatory actions by the defendants.

Moreover, the Justice Department's regulations contemplate allowing association claims in cases such as this. The regulations implementing Title II of the ADA indicate that the agency intended to extend protection to a broad range of plaintiffs and associations. The Appendix to 28 C.F.R. § 35.130 states:

> Paragraph (g), which prohibits discrimination on the basis of an individual's or entity's known relationship or association with an individual with a disability, is based on sections 102(b)(4) [codified at 42 U.S.C. § 12112(b)(4)] and 302(b)(1)(E) [codified at 42 U.S.C. § 12182] of the ADA. This paragraph was not contained in the proposed rule. The individuals covered under this paragraph are *any individuals who are discriminated against because of their known association with an individual with a disability*. For example, it would be a violation of this paragraph for

> a local government to refuse to allow a theater company to use a school auditorium on the grounds that the company had recently performed for an audience of individuals with HIV disease.

28 C.F.R. § 35.130 app. A at 526 (2001)(emphasis added). The emphasized portion of the appendix indicates that the regulation was intended to cover any individual who is discriminated against because he is associated with individuals with disabilities. The Appendix continues:

> This protection is not limited to those who have a familial relationship with the individual who has a disability. *Congress considered, and rejected, amendments that would have limited the scope of this provision to specific associations and relationships*. Therefore, if a public entity refuses admission to a person with cerebral palsy and his or her companions, the companions have an independent right of action under the ADA and this section.

Id. (emphasis added). This paragraph illustrates the intended broad scope of the regulation, confirming the agency's intent to include nonspecific associations and relationships such as the association between a planned business and its potential customers. The final paragraph of the Appendix that deals with Title II's association provision reiterates that commercial "entities" are to be covered:

> During the legislative process, the term "entity" was added to section 302(b)(1)(E) [codified at 42 U.S.C. § 12182] to clarify that *the scope of the provision is intended to encompass not only persons who have a known association with a person with a disability, but also entities that provide services to or are otherwise*

> *associated with such individuals*. This provision was intended to ensure that entities such as health care providers, employees of social service agencies, and others who provide professional services to persons with disabilities are not subjected to discrimination because of their professional association with persons with disabilities.

Id. at 526-27 (emphasis added). The Technical Manual entry for Title II's association provision also indicates the Justice Department's intended broad coverage of the regulation:

> A State or local government may not discriminate against individuals or entities because of their known relationship or association with persons who have disabilities. This prohibition applies to cases where the public entity has knowledge of both the individual's disability and his or her relationship to another individual or entity. In addition to familial relationships, *the prohibition covers any type of association between the individual or entity that is discriminated against* and the individual or individuals with disabilities, if the discrimination is actually based on the disability.
>
> ILLUSTRATION 1: A county recreation center may not refuse admission to a summer camp program to a child whose brother has HIV disease.
>
> ILLUSTRATION 2: A local government could not refuse to allow a theater company to use a school auditorium on the grounds that the company has recently performed at an HIV hospice.

> ILLUSTRATION 3: If a county-owned sports arena refuses to admit G, an individual with cerebral palsy, as well as H (his sister) because G has cerebral palsy, the arena would be illegally discriminating against H on the basis of her association with G.

TA Manual § II-3.9000 at 7 (1993)(emphasis added). Certainly, the expected association between a startup business and its potential customers falls within the broad meaning of the phrase "any type of association."

Moreover, discrimination because of association in the real world is not limited to instances where there is a long-lasting relationship between an individual with a disability and an entity against whom the government entity discriminates. It is just as unlawful for a local government to disallow use of a public auditorium to a theater company because it has booked a performance for individuals with HIV disease as it would be if the discrimination happened after the performance, as in Illustration 2 above. TA Manual § II-3.9000 at 7, Illus. 2 (1993). Indeed, discrimination of the sort alleged here might conceivably be more damaging to individuals with disabilities than direct discrimination. An entrepreneurial wheelchair retail outlet that is denied a zoning permit because of its association with potential customers that are certain to have disabilities should not be denied a remedy simply because it has yet to sell any wheelchairs. Its association with individuals with disabilities is known in the sense that one of its intended and significant purposes is to accommodate the specific needs of persons with disabilities.

To rule otherwise would allow public entities with discriminatory intent to effectively block startup companies that service people with disabilities from entering the market at all. The chilling effect on commerce that is associated with

persons with disabilities is one of the very evils that the association provisions of the ADA seek to protect. Therefore, a proposed entity designed to accommodate the specific needs of qualified individuals with disabilities shall be given the same protection under Title II's association provision as an entity that has an association with specifically identifiable individuals with disabilities.

Reading the pro se complaint liberally, plaintiffs allege that their business will be marketed toward customers who have disabilities. They picked the plot of land for the bed and breakfast because of its proximity to a veteran's cemetery, which they believe will attract a more than average number of customers with disabilities. In any event, the proposed bed and breakfast, for which the special use permit was requested, had two handicapped-accessible rooms rather than the required one. Since plaintiffs' proposed entity was designed to accommodate the specific needs of qualified individuals with disabilities, plaintiffs' association with their customers is sufficient to confer standing in this case. The court notes that plaintiffs bear a heavy burden to prove that defendants' actions were based on unlawful discrimination against individuals with disabilities, and holds only that the complaint, liberally construed, is sufficient to withstand a motion to dismiss under Fed.R.Civ.P. 12(b)(6) on the issue of standing.

Even when a plaintiff has standing to bring a claim, he must allege the unlawful conduct properly and completely. Plaintiffs wishing to invoke Title II's association provision must allege that: (1) a logical and significant association with an individual with disabilities; (2) that a public entity knew of that association; (3) that the public entity discriminated against them because of that association; and (4) they suffered a direct injury as a result of the discrimination. 28 C.F.R.

§ 35.130. This court will follow its sister court in the Eastern District of Wisconsin with respect to the first requirement, holding that zoning decisions by local governments are "activities" performed by public entities. *See Oak Ridge*, 896 F. Supp. at 873. Thus, the first requirement has been met.

Second, the instant plaintiffs sufficiently allege that the Will County Board knew of their plans to provide special accommodations for customers with disabilities, thus satisfying the requirement that the public entity knew of the association, and that they were discriminated against because of that association. Finally, plaintiffs have alleged that their business plans have been disrupted as a direct result of the Will County Board's discrimination., satisfying the requirement that plaintiffs themselves suffer injury as a result of the public entity's discrimination. Therefore, because plaintiffs have satisfied each of the necessary elements of a prima facie case under the association provision of Title II of the ADA, defendants' motion to dismiss with respect to plaintiffs' ADA claim is denied.

Due Process Claims

Plaintiffs allege that the Will County Board violated the due process clause of the Fourteenth Amendment in denying them a special use permit, denying them full use of their land and failing to rule on their remodeling permit. These claims fail because they are not yet ripe for adjudication.

In addition to standing, several other jurisdictional requirements exist in order to weed out improper claims. One such requirement, designed to filter out cases that are not yet ready for adjudication, is called "ripeness." *See Williamson County v. Hamilton Bank*, 473 U.S. 172, 188-89, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985). *Williamson* set forth special

ripeness requirements with which courts are to consider substantive due process allegations. *Forseth v. Village of Sussex*, 199 F.3d 363, 372 (7th Cir. 2000). In order to for a substantive due process claim relating to a municipality's zoning decision to be ripe, the plaintiff must satisfy two requirements: (1) the "Final Decision Requirement" mandates that the plaintiff demonstrate that he or she received a final decision from the relevant government entity; and (2) the "Exhaustion Requirement" requires that the plaintiff must have sought redress through state procedures before resorting to a due process claim under the United States Constitution. *Id.*

Fulfilling the exhaustion requirement is more procedure-intensive than the final decision requirement. The Illinois Counties Code provides that the decisions of the county board are subject to judicial review under Illinois' Administrative Review Law. 55 ILCS 5/1-6007. The Illinois Administrative Review Law confers jurisdiction for review of administrative decisions in the circuit courts of Illinois. 735 ILCS 5/3-104. However, for a decision to be considered by the circuit courts, the complaining party must have explored all possible administrative rehearing and review possibilities. *Id.; see County of Knox v. Highlands, L.L.C.*, 188 Ill. 2d 546, 551, 723 N.E.2d 256, 260, 243 Ill. Dec. 224 (1999). Plaintiffs must have exhausted these appellate procedures before bringing their due process case in federal court. *Forseth*, 199 F.3d at 372.

Plaintiffs here allege that their rights have been violated with respect to both the remodeling permit and the special use permit. Plaintiffs have not received word from the county on their remodeling permit, and have correctly filed for a declaratory judgment in the Circuit Court of Will County asking that the remodeling permit be issued. Thus, with

respect to the remodeling permit, plaintiffs have not fulfilled either of the necessary requirements for this court to consider the constitutionality defendant's denial of that permit. Accordingly, this court does not have jurisdiction to consider plaintiffs due process claim with respect to the remodeling permit until plaintiffs exhaust their state court remedies.

In order for this court to hear plaintiffs' allegations with respect to the denial of their special use permit application, they must also have satisfied both the final decision and exhaustion of remedies requirements. The Will County Board was the correct government agency to consider whether to issue the special use permit, and the denial of the permit was final, thus fulfilling the final decision requirement. However, plaintiffs have not filed suit in Illinois state court, and therefore have not satisfied the exhaustion requirement.

Equal Protection

Plaintiffs also allege that their rights under the equal protection clause of the Constitution were violated. Generally, to state a claim for violation of the equal protection clause of the 14th Amendment, the plaintiff must allege membership in a protected class that has been singled out for unequal treatment by the government. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440-41, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985). The Supreme Court has also recognized a "class of one" claim, where a claim may be sufficient if the plaintiff alleges that he has been intentionally treated differently from others similarly situated and that there is no rational basis for the different treatment. *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000). Additionally, the Seventh Circuit recognizes that an individual also may state a claim under the equal protection clause if he can show that state government

took an action that was a spiteful effort to "get" him for reasons wholly unrelated to any legitimate state objective. *Albiero v. City of Kankakee*, 246 F.3d 927, 932 (7th Cir. 2001). "To prevail, the plaintiff must demonstrate that the government is treating unequally those individuals who are prima facie identical in all relevant respects, and that the cause of the differential treatment is a totally illegitimate animus toward the plaintiff by the defendant" *Id.* (Internal citations omitted.) If the defendant would have taken the complained-of action anyway, even if it had not had illegitimate animus, the animus would not condemn the action. *Id.* Ill will must be the sole cause of the complained-of action. A showing of "uneven law enforcement," standing alone, will not suffice. *Id.*

In the instant case, plaintiffs have not alleged that they were treated any differently from anyone similarly situated, and therefore 14th Amendment claim is insufficient.

Other Claims

Finally, plaintiffs complain that the Will County ordinances are more restrictive than the state laws passed with regard to bed and breakfasts, and are therefore improper. State law provides that bed and breakfasts shall have no more than five rooms, whereas Will County ordinance states that the county maximum number of rooms is four. 50 ILCS 820/2; Will County Ordinance 8.21(c). Plaintiffs point out further the discrepancy that Illinois law requires that the operator of a bed and breakfast live "on contiguous property" from the bed and breakfast establishment, whereas the Will County ordinance mandates that the operator/owner "shall live on the premises where the bed and breakfast is active." 50 ILCS 820/2; Will County Ordinance 8.21(f). There are, however, no improper discrepancies here. The Illinois bed

and breakfast act explicitly allows the county to regulate bed and breakfasts in unincorporated areas: "The corporate authorities of any county or municipality shall...provide for the regulation, safe operation, licensing and inspection of bed and breakfast establishments." 50 ILCS 820/3(1). In enacting both ordinances, Will County has done exactly what it was asked to do by the Illinois legislature according to 50 ILCS 820/3(1). Therefore, this claim has no merit.

CONCLUSION

For the reasons set forth above, defendants' motion to dismiss with respect to plaintiffs' claim under the association provision of the ADA is denied. Defendants' motion to dismiss all other claims is granted. Defendants are directed to file an answer to the remaining claim on or before April 11, 2002. This matter is set for a report on status April 18, 2002, at 9:00 a.m. .

ENTER: March 14, 2002

Robert W. Gettleman

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 01 C 2779

[Filed July 22, 2002]

B. MICHAEL SCHNEIDER and JANINE L. BALLY, Plaintiffs,	)
v.	)
COUNTY OF WILL, STATE OF ILLINOIS, et al, Defendants.	)

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE ROBERT W. GETTLEMAN

(Proceedings in open court.)

THE CLERK: 01C 2779, Schneider versus County of Will; motion for injunction.

PLAINTIFF SCHNEIDER: Good morning, Your Honor. Michael Schneider for the plaintiff.

MS. O'SHEA: Good morning, Your Honor.
Shannon O'Shea on behalf of defendants.

PLAINTIFF SCHNEIDER: Your Honor, I come to you this morning seeking the disqualification of the law firm of Kiesler & Berman. They have not complied with the state statute seeking court appointment to represent the County of Will.

In that regard, I've carefully researched it. I had filed this motion back in January. The county has not sought to correct or communicate with me on that particular issue. I don't know if --

THE COURT: Well, let her respond.
What do you say?

MS. O'SHEA: We informed Mr. Schneider back in January that our law firm has been appointed by Will County State's Attorney Jeff Tomczak as Special Assistant State's Attorneys to carry out and to assist him in the carrying out of his duties. We've been appointed in various other cases.

We've advised Mr. Schneider that in our opinion 9008 does not apply. It was true the first time, but he's proceeded with it now.

THE COURT: All right. I don't think that it's within my jurisdiction to get involved in that. If you want to take an action in the state courts to enforce that, I don't see any federal hook on that motion at all. If the State's Attorney has appointed counsel to represent his client, that is a state matter, and it has nothing to do with the underlying federal action in this case. So that motion is denied.

Do you have another motion?

PLAINTIFF SCHNEIDER: The motion for injunction, Your Honor, was--

THE COURT: I'm not denying– I am not enjoining a state court proceeding. I think I made that pretty plain before.

PLAINTIFF SCHNEIDER: Yes, sir.

THE COURT: So we're not doing that.

Now, I do have some news for you, however. On the motion to dismiss, I am granting the motion to dismiss in all respects except for the ADA claim. I have a draft opinion that I'm polishing up at the moment, and I will have it probably out today.

So the ADA claim is the only thing that is surviving by now. And I say in the opinion, and I want to say it to you personally, it is on a factual basis a very difficult case to prove. I just want -- that at least is the way I see it at this point. You're taking on a great burden. And the case is hanging there by one thread, and it's a thread that I think is strong enough to hold it at this point. But you would be well advised if you want to proceed with this case to get a lawyer to represent you. I'm not going to say it again.

PLAINTIFF SCHNEIDER: Thank you, Your Honor.

THE COURT: All right. But anyway, that will be coming out. And I'm giving -- I forget, but if it comes out today, there is one count then that the county would have to answer.

I would give you, I don't know, how much time would you want, assuming it comes out today, how much time would you want to file your response? It will be an answer.

MS. O'SHEA: 28 days would be fine. Your Honor.

THE COURT: 28 days? All right. That will be April 11th.

MS. O'SHEA: Your Honor, if I may ask you to clarify something with the plaintiffs. In his motion for injunction and motion to disqualify, he again raises the issue of removing the circuit court actions, which you denied back in January, so I don't know if it's a motion to reconsider. What Mr. Schneider does not seem to understand, that's not going to happen.

THE COURT: No. Well, it's not going to happen, I'm denying both of the motions that were up today.

That's what I mean, you're in these very technical areas here. You really ought to get a lawyer. If this is worth fighting for and putting all this effort into, then it should be worth getting a lawyer.

PLAINTIFF SCHNEIDER: I have been -

THE COURT: That's the way I see it, because you may get yourself into a real problem here if you go off in an area like this, which is very complicated, to say the least, and on a factual basis very difficult to prove, regardless of the legal complications. You may be expending an awful lot of your own time and resources, and if you're not successful, you may be responsible for costs and who knows what at the end of the day. That's why, you know, you would be well advised to get a lawyer. I can't tell you any more than that.

I'm not going to appoint a lawyer for you in a case like this. It is a commercial case.

PLAINTIFF SCHNEIDER: No. I understand. I am trying all the time to try to get a lawyer. I'm continuing on and on.

THE COURT: There are lawyers who take ADA cases, you know.

PLAINTIFF SCHNEIDER: Unfortunately, their fees and our economic circumstance at this point is not privileged to hire them.

MS. O'SHEA: We have a pending motion for sanctions in the circuit court. I've been trying to get this all to go away and asking plaintiffs to come up with what it exactly is that they want. He came up with a multipage list of demands, told us that if we didn't respond in the affirmative in 14 days, we'd be acting in bad faith, and he would proceed accordingly.

So I can tell him right now on the record we're not going to respond affirmatively to their terms. I don't know what he means by saying he's going to proceed.

PLAINTIFF SCHNEIDER: Well, in court.

THE COURT: They want a permit. They want to build a B&B. I mean, that's what they want. It's prett– at least I think that's what they want.

All right. Anyway, you'll get the opinion, it will be put in the mail today. I'm giving you until the 11th to file the

answer to the ADA count. Come back and see me for status on the 18th of April, 9:00 o'clock.

MS. O'SHEA: Thank you, Your Honor.

THE COURT: All right. At that point I'd like, I know that you're not getting along real well, but I'd like you to talk to each other about what type of discovery you think you might need in this case and what type of additional motions that either party might anticipate.

MS. O'SHEA: Thank you, Your Honor. THE COURT: Okay. Thank you.

(Proceedings concluded.)

CERTIFICATE

I, Jennifer S. Costales, do hereby certify that the foregoing is a complete, true, and accurate transcript of the proceedings had in the above-entitled case before the Honorable ROBERT W. GETTLEMAN, one of the judges of said Court, at Chicago, Illinois, on March 14, 2002.

/s/_____
Official Court Reporter
United States District Court
Northern District of Illinois
Eastern Division

APPENDIX E

Will County Land Use Department's Exhibit to the Report to the Will County Board showing that (2) of the guestrooms were designed to accommodate wheelchair accessibility. The Exhibit is one of the Exhibits that the Will County Board relied upon in their Decision to cast their unanimous 21-0 vote to deny Plaintiffs' Application For a Special Use Permit.
This was included in Plaintiff's Separate Appendix in 04-2058 appeal as well as the Plaintiffs' Response to the County's Motion for Summary Judgment

Architectural Drawing

(See Fold Out)

APPENDIX F

January 25, 2002

Mr. B. Michael Schneider
Ms. Janine Bally
126 Inner Court
New Lenox, IL 60451

Re: Schneider v. County of Will
Court No. 01 C 2779
Our File No. 01 X 197

Dear Mr. Schneider and Ms. Bally:

We have received your Motion to Disqualify, set for hearing on January 30, 2002. As Mr. Pavlovich advised you on January 23, 2002, we are representing the County of Will and the County of Will and the county board members pursuant to a designation by Mr. Tomczak, the Will County State's Attorney, to defend this action as Special Assistant State's Attorneys. We have taken Oaths to faithfully discharge the duties of the office of Special Assistant State's Attorney for representing Will County and its various officers.

In your motion, you cite 55 ILCS 5/3-9008 as apparent grounds for your contention that our law firm should be disqualified. Section 3-9008 is inapplicable, however, to our representation of Will County and its various officers.

Very Truly yours,

Shannon F. O'Shea

APPENDIX G

JAN GOULD
COUNTY CLERK OF WILL COUNTY
302 N CHICAGO STREET
JOLIET, ILLINOIS 60432

JULY 26, 2002

Mike Schneider\

Re: YOUR FOI REQUEST FOR INFORMATION AS IT RELATES TO CONTRACTS, RESOLUTIONS ETC. WITH KISLER AND BERMAN; AND INFORMATION AS TO MEMBERS OF THE WILL COUNTY HEALTH BOARD IN THE YEAR 1999

I am attaching hereto a copy of the members of the Will County Health Board in the year 1999.

Also enclosed is a copy of a "Special State's Attorney's Oath" for David Kiesler, filed in this office on May 30, 2001.

As to resolutions and/or contracts dealing specifically with Kiesler and Berman, in any law case, there are none for the period 2001-2002.

If we may be of any further assistance, please call.

/s/ Claire M. Hubbell
Claire M. Hubbell
Chief Deputy to the County Clerk

Attachments (2)

APPENDIX H

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

OATH

SPECIAL ASSISTANT STATE'S ATTORNEY

I, David Kiesler, do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of Illinois and that I will faithfully discharge the duties of the office of Special Assistant State's Attorney for representing Will County and its various officers according to the best of my ability in those legal matters assigned to me by the State's Attorney.

/s/ Davied Kiesler
ARDC _____

Subscribed and sworn to before me this
17th day of April, 2001.

/s/ John Juracha
Notary Public

[SEAL]

APPENDIX I

55 ILCS 5/3-9005

§ 3-9005. Powers and duties of State's attorney.

(a) The duty of each State's attorney shall be:

(4) To defend all actions and proceedings brought against his county, or against any county or State officer, in his official capacity, within his county.

55 ILCS 5/3-9008

§ 3-9008. Appointment of attorney to perform duties. Whenever the State's attorney is sick or absent, or unable to attend, or is interested in any cause or proceeding, civil or criminal, which it is or may be his duty to prosecute or defend, the court in which said cause or proceeding is pending may appoint some competent attorney to prosecute or defend such cause or proceeding, and the attorney so appointed shall have the same power and authority in relation to such cause or proceeding as the State's attorney would have had if present and attending to the same, and in case of a vacancy of more than one year occurring in any county in the office of State's attorney, by death, resignation or otherwise, and it becomes necessary for the transaction of the public business, that some competent attorney act as State's attorney in and for such county during the period between the time of the occurrence of such vacancy and the election and qualification of a State's attorney, as provided by law, the vacancy shall be filled upon the written request of a majority of the circuit judges of the circuit in which is located the county where such vacancy exists, by appointment as provided in The Election Code of some competent attorney to

perform and discharge all the duties of a State's attorney in the said county, such appointment and all authority thereunder to cease upon the election and qualification of a State's attorney, as provided by law. Any attorney appointed for any reason under this Section shall possess all the powers and discharge all the duties of a regularly elected State's attorney under the laws of the State to the extent necessary to fulfill the purpose of such appointment, and shall be paid by the county he serves not to exceed in any one period of 12 months, for the reasonable amount of time actually expended in carrying out the purpose of such appointment, the same compensation as provided by law for the State's attorney of the county, apportioned, in the case of lesser amounts of compensation, as to the time of service reasonably and actually expended.

ILLINOIS Constitution Art. 2, § 1

1. Separation of Powers

The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another.

Duties of County Boards

55 ILCS 5/1-6003

§ 1-6003. Duty of county board to prosecute and defend suit. It shall be the duty of the county boards of each of the counties of this State to take and order suitable and proper measures for the prosecuting and defending of all suits to be brought by or against their respective counties, and all suits which it may become necessary to prosecute or defend to enforce the collection of all taxes charged on the state assessment.

State of Illinois' Zoning Enabling Statutes

55 ILCS 5/5-12008

§ 5-12008. Enforcement of ordinances or resolutions. All ordinances or resolutions passed under the terms of this Division shall be enforced by such officer of the county as may be designated by ordinance or resolution. The ordinance or resolution may require that for any class or classes of districts created thereby, applications be made for permits to erect buildings or structures, or to alter or remodel existing buildings or structures, and may vest in the officer designated to enforce the ordinance or resolution, the power to make orders, requirements, decisions and determinations with respect to applications for such permits and with respect to the enforcement of the terms of the ordinance or resolution

55 ILCS 5/5-12009.5

(a) The county board may, by an ordinance passed under this Division, provide for the classification of special uses. Those uses may include, but are not limited to, public and quasi-public uses affecting the public interest; uses that have a unique, special, or unusual impact upon the use or enjoyment of neighboring property; and uses that affect planned development. A use may be permitted in one or more zoning districts and may be a special use in one or more other zoning districts.

55 ILCS 5/5-12011

§ 5-12011. Hearing and decision of board of appeals. The board of appeals shall also hear and decide appeals from and review any order, requirement, decision or determination made by an administrative official charged with the

enforcement of any ordinance or resolution adopted pursuant to this Division.

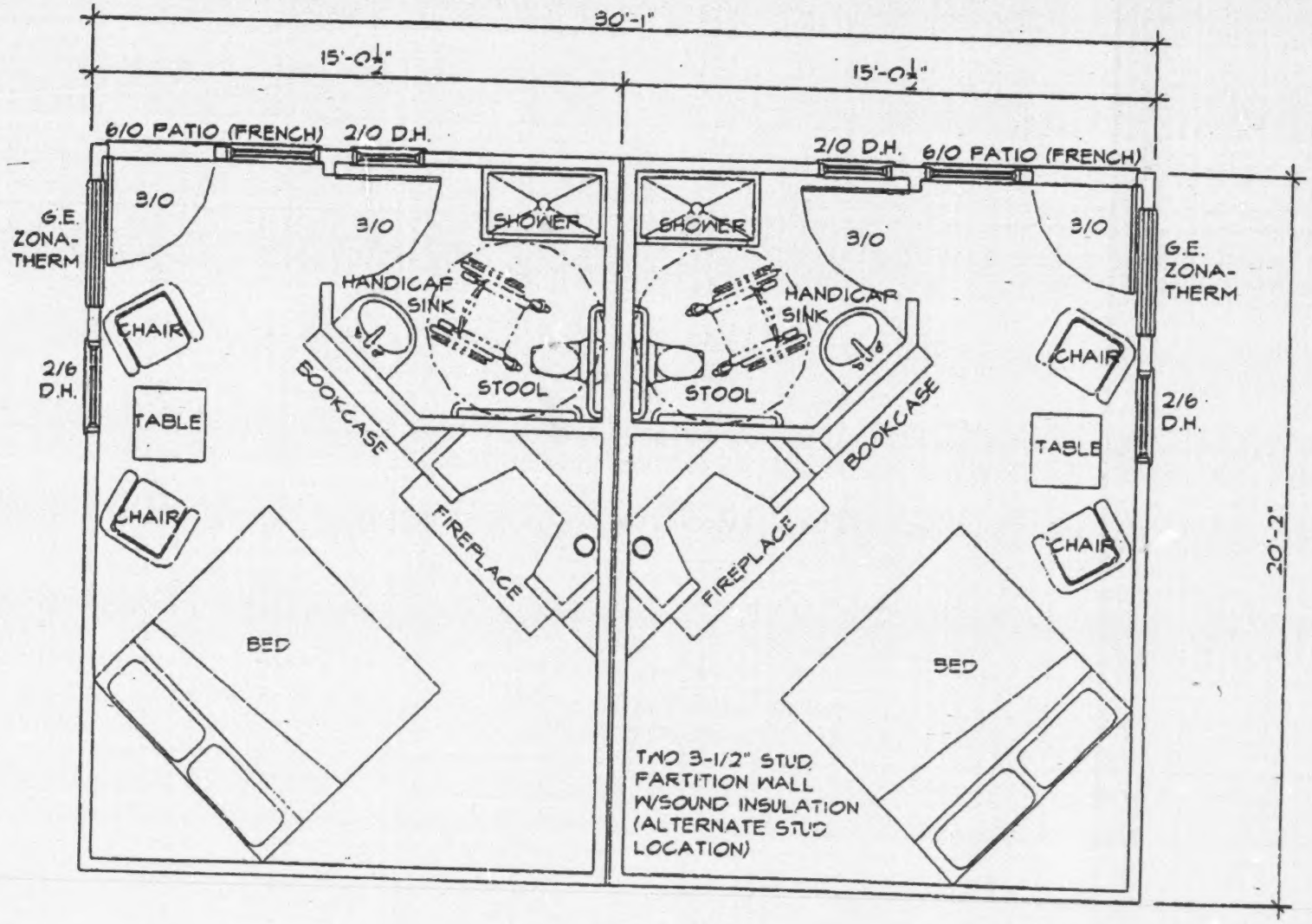
(Redacted text as it is inapplicable to the instant case.)

An appeal stays all proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the board of appeals after the notice of appeal has been filed with him that by reasons of facts stated in the certificate a stay would, in his opinion, cause imminent peril to life or property, in which case proceedings shall not be stayed otherwise than by a restraining order which may be granted by the board of appeals or by a court on application, on notice to the officer from whom the appeal is taken and on due cause shown.

55 ILCS 5/5-12012

§ 5-12012. Hearing of appeal; review under Administrative Review Law. The board of appeals shall fix a reasonable time for the hearing of the appeal and give due notice thereof to the parties and decide the same within a reasonable time. Upon the hearing, any party may appear in person or by agent, or by attorney. The board of appeals may reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination as in its opinion ought to be made in the premises, and to that end shall have all the powers of the officer from whom the appeal is taken.

All final administrative decisions of the board of appeals hereunder shall be subject to judicial review pursuant to the provisions of the Administrative Review Law, [FN1] and all amendments and modifications thereof, and the rules adopted pursuant thereto. The term "administrative decision" is defined as in Section 3-101 of the Code of Civil Procedure. [FN2]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SHOWER
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G.E. ZONA-THERM
HANDICAP SINK
HANDICAP SINK
CHAIR
CHAIR
2/6 D.H.
STOOL
STOOL
2/6 D.H.
TABLE
TABLE
BOOKCASE
BOOKCASE
CHAIR
CHAIR
FIREPLACE
FIREPLACE
BED
BED
TWO 3-1/2" STUD PARTITION WALL W/SOUND INSULATION (ALTERNATE STUD LOCATION)
20'-2"

State of Illinois' Bed and Breakfast Act

50 ILCS 820/1

Formerly cited as IL ST CH 71 101

§ 1. This Act shall be known and may be cited as the "Bed and Breakfast Act"

P.A. 85-399, § 1, eff. Sept. 14, 1987.

50 ILCS 820/2

(a) "Bed and breakfast establishment" shall mean an operator-occupied residence providing accommodations for a charge to the public with no more than 5 guest rooms for rent, in operation for more than 10 nights in a 12 month period. Breakfast may be provided to the guests only. Bed and breakfast establishments shall not include motels, hotels, boarding houses, or food service establishments.

(b) "Operator" shall mean the owner of the bed and breakfast establishment, or the owner's agent, who is required by this Act to reside in the bed and breakfast establishment, or on contiguous property.

(c) "Guest room" shall mean a sleeping room intended to serve no more than 2 transient guests per night.

50 ILCS 820/3

§ 3. The corporate authorities of any county or municipality shall:
(1) Provide for the regulation, safe operation, licensing and inspection of bed and breakfast establishments.

(2) Provide for examination and regulation of bed and breakfast establishment operators.

(3) Designate and use full-time municipal, district, county or multi-county health departments and local fire departments as its agents

APPENDIX J

APPLICABLE COUNTY OF WILL ZONING ORDINANCES

(citations are given for the language pertinent to the issues on appeal)

8.21 BED AND BREAKFAST ESTABLISHMENTS
(in its entirety)

Statement of Purpose: The purpose of this Section is to establish guidelines for the operation of bed and breakfast establishments in the County.

Bed and breakfast operations shall be subject to the following provisions:

1. A bed and breakfast establishment is allowed as a special use in the following agricultural and residential districts: A-1, A-2, E-1, and E-2;
2. Length of stay for a lodger shall not exceed ten (10) consecutive days;
3. Number of guest rooms is limited to four (4) bedrooms in the dwelling unit. Maximum occupancy is limited to two (2) adults per guest room;
4. A single identification sign not to exceed two (2) square feet may be erected. Such sign shall be non-illuminated and shall be attached flat against the front wall of the building it identifies;

5. Tandem off-street parking spaces may be provided, but not more than two (2) deep. No parking spaces shall be provided in the front yard; and,
6. The dwelling in which the bed and breakfast operates shall be the principal residence of the operator/owner and the operator/owner shall live on the premises where the bed and breakfast is active.

8.22 HOME OCCUPATIONS
(in its entirety)

An occupation conducted in a dwelling unit, provided that:

1. Home occupations are allowed as an accessory use in the following agricultural and residential districts: A-1, A-2 E-1, E-2, R-1, R-2, R-2A, R-3, R-4, R-5 and R-6;
2. One (1) person other than members of the family residing on the premises shall be engaged in such occupation;
3. The use of the dwelling unit for the home occupation shall be clearly incidental and subordinate to its use for residential purposes by its occupants; the use of the unit for home occupation shall be restricted to a space equal to or less than twenty-five percent (25%) of the floor area of the dwelling unit;
4. There shall be no change in the outside appearance of the building or premises, or other visible evidence of the conduct of such home occupation other than one sign, not exceeding two (2) square feet in area, non-illuminated, and mounted flat against the wall of the principal building;
5. No traffic shall be generated by such home occupation in greater volumes than would normally be expected in a residential neighborhood, and any need for

parking generated by the conduct of such home occupation shall be met off the street and other than in a required front yard; and,

6. No equipment or process shall be used in such home occupation which creates noise, vibration, glare, fumes, odors, or electrical interference detectable to the normal senses off the lot, if the occupation is conducted in a single-family residence. In the case of electrical interference, no equipment or process shall be used which creates visual or audible interference in any radio or television receivers off the premises, or causes fluctuations in line voltage off the premises;
7. A dealer in firearms shall be allowed as a home occupation with a special use permit only.

14.4 PLANNING AND ZONING COMMISSION
(applicable language only)

14.4-1 Creation and Membership

The existing Zoning Board of Appeals is hereby authorized to be continued as the Planning and Zoning Commission. The word "Commission" when used in this Section shall be construed to mean the Planning and Zoning Commission. The said Commission shall consist of seven members appointed by the County Executive and confirmed by the members of the County Board, and such members shall receive such allowances for expenses and such compensations as shall be provided by the County Board. The members of said Commission shall serve, respectively, for five (5) years, or until their respective successors are appointed. The terms of the members shall be staggered in accordance with State Statutes.

14.4-4 Finality of Decisions of the Planning and Zoning Commission

All decisions and findings of the Planning and Zoning Commission, on appeal or upon application for a variation after a hearing, shall, in all instances, be final administrative determinations and shall be subject to review by courts as the law may provide.

14.9 APPEALS

14.9-1 Authority

The Planning and Zoning Commission shall hear and decide appeals from an administrative order, requirement or determination under this Ordinance.

14.9-2 Scope of Appeals

An appeal, in which it is alleged that there is error in any decision made by the Zoning Administrator under this Ordinance, may be taken to the Planning and Zoning Commission by any person or governmental agency aggrieved by such decision or by any department, officer, board or bureau of the County. Such an appeal shall be taken within such time as shall be prescribed by the Commission by rule, by filing with the County Clerk a notice of appeal in such form as the Commission may provide by rule. The County Clerk shall, without delay, forward to the Commission a copy of the notice of appeal together with all of the papers constituting the record upon which the decision appealed from was made.

14.9-3 Stay of Proceedings

An appeal shall stay all proceedings in furtherance of the decision appealed unless the Zoning Administrator certifies to the Planning and Zoning Commission after the notice of the appeal has been filed with him, that by reason of facts stated in the certificate, a stay would, in his/her opinion, cause imminent peril to life or property, in which case the proceedings shall not be stayed unless by a restraining order, which may be granted by the Commission or by a court of record on application, in notice to the Zoning Administrator and on due cause shown.

14.9-4 Hearing

The Secretary shall provide notice to the applicant and the Zoning Administrator of the time and place for the hearing of the appeal. The Secretary shall give notice to the applicant not less than fifteen (15) days as provided herein by Section 14.4-3.

14.9-5 Decisions

The Planning and Zoning Commission shall render a written decision on the appeal within a reasonable time, but in no event more than ninety (90) days after the filing of the notice of appeal, and shall promptly forward a copy of the decision to the parties. The Commission may affirm or may, upon the concurring vote of five (5) members, reverse, wholly or in part, or modify the decision of the Zoning Administrator, as in its opinion ought to be done, and to that end shall have the powers of the Zoning Administrator. All decisions, after hearing of the Planning and Zoning Commission from the administrative order requirement, decision, or determination of the Zoning Administrator shall be subject to appeal before

the Will County Board. The Commission may dismiss any appeal whenever the applicant fails to appear at the scheduled hearing.

A written appeal from final decisions of the Planning and Zoning Commission, where the proposed variation failed, may be filed by an aggrieved party with the Land Use and Zoning Committee of the Will County Board within fifteen (15) days of the date of the Planning and Zoning Commission decision. The Land Use and Zoning Committee will make a recommendation to the full Will County Board. Any proposed variation which failed to receive Planning and Zoning Commission approval shall not be passed except by a three-fourth (¾) vote of all members of the Will County Board. Every variation shall be accompanied by a finding of fact specifying the reason for making such variation.

Any decisions of the Planning and Zoning Committee not appealed to the full Will County Board via its Land Use and Zoning Committee within fifteen (15) days of the date of the Planning and Zoning Committee decision shall in all cases be final administrative determinations and shall be subject to judicial review only in accordance with applicable Illinois Statutes.

State Statutes Applicable to Petitioners Claims of Deprivation of Use and Maintenance of their property without due process of law dating from August of 1999.

Sec. 5-12001. Authority to regulate and restrict location and use of structures.

The powers by this Division given shall not be exercised so as to deprive the owner of any existing property of its use or maintenance for the purpose to which it is then lawfully

devoted, (Inapplicable language pertinent to the County's authority to the utilization of their zoning police powers is deleted herein by the Petitioners).

Sec. 5-12017. Violations.

In case any building or structure is erected, constructed, reconstructed, altered, ***repaired***, converted or ***maintained or any building, structure or land is used in violation of this Division or of any ordinance, resolution or other regulation made under authority conferred thereby, the proper authorities of the county*** or of the township ***in which the building, structure, or land is located,***.....in addition to other remedies, ***may institute any appropriate action or proceedings in the circuit court to prevent such*** unlawful erection, construction, reconstruction, alteration, repair, conversion, ***maintenance or use, to restrain***, correct, or abate such violation, ***to prevent the occupancy of said building***, structure or land ***or to prevent any illegal act***, conduct, business, ***or use in or about such premises***.

Any person who violates the terms of any ordinance adopted under the authority of this Division shall be guilty of a petty offense punishable by a fine not to exceed $500, with each week the violation remains uncorrected constituting a separate offense.

(Source: P.A. 92-347, eff. 8-15-01.) (Emphasis by Petitioners added)

The Illinois Constitution, Article VII Section 7

SECTION 7. COUNTIES AND MUNICIPALITIES OTHER THAN HOME RULE UNITS

Counties and municipalities which are not home rule units shall have only powers granted to them by law and the powers (1) to make local improvements by special assessment and to exercise this power jointly with other counties and municipalities, and other classes of units of local government having that power on the effective date of this Constitution unless that power is subsequently denied by law to any such other units of local government; (2) by referendum, to adopt, alter or repeal their forms of government provided by law; (3) in the case of municipalities, to provide by referendum for their officers, manner of selection and terms of office; (4) in the case of counties, to provide for their officers, manner of selection and terms of office as provided in Section 4 of this Article; (5) to incur debt except as limited by law and except that debt payable from ad valorem property tax receipts shall mature within 40 years from the time it is incurred; and (6)to levy or impose additional taxes upon areas within their boundaries in the manner provided by law for the provision of special services to those areas and for the payment of debt incurred in order to provide those special services.

Supreme Court, U.S
FILED
SEP 16 2005
OFFICE OF THE CLERK

No. 05-137

In the Supreme Court of the United States

B. MICHAEL SCHNEIDER
& JANINE L. BALLY,
Petitioners,

v.

COUNTY OF WILL, ILLINOIS &
THE WILL CO. BOARD MEMBERS
IN THEIR OFFICIAL CAPACITY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

B. MICHAEL SCHNEIDER
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Pro se Petitioners

Becker Gallagher Legal Publishing, Inc. 800.890.5001

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File No. 97-001. issued January 9,1997 6

SUPPLEMENTAL BRIEF PURSUANT TO RULING OF THE 7TH CIRCUIT COURT OF APPEALS

BASIS FOR FILING A SUPPLEMENTAL BRIEF

On July 27, 2005 this Court docketed Petitioners' Petition for Writ of Certiorari as No. 05-137, Schneider v. Will County, Il. et al.

On August 18, 2005 the 7th Circuit Court of Appeals issued a published opinion in the matter of Schmude v. Sheahan, 2005 WL 1981354, in which the Court addressed, decided and overturned an important issue relevant to an issue presented in the instant Petition.

Authority to file a Supplemental Brief is allowed pursuant to Supreme Court Rule 15.8 since the ruling by the 7th C.A. in Schmude overturns the ruling made in the instant case.

NATURE AND EFFECT OF THE 7th CIRCUIT'S RULING IN SCHMUDE

In Schmude, the 7th Circuit Court of Appeals held that a U.S. District Court had authority under the clear language of the State of Illinois' Statute, 55 ILCS 5/3-9008, to appoint a Special State's Attorney as a substitute for the duly elected State's Attorney of an Illinois County pursuant to a motion to do so.

The Schmude case differs factually from the instant case in the way that the Schmude case involved the appointment of a Special State's Attorney by a Cook County Circuit Judge after the case had been removed from state court to federal court. In the instant case, this action originated in the U.S.

District Court of the Northern District of Illinois' Eastern Division, unlike the Schmude case in which removal jurisdiction was at issue.

In the Schmude case, the 7th Circuit Court of Appeals held that a state court and the federal court were both authorized to appoint a Special State's Attorney pursuant to 55 ILCS 5/3-9008 and the state court could exercise that authority after the case had been removed from the state court jurisdiction. Removal jurisdiction does not apply here.

ARGUMENT

The 7th Circuit Court of Appeals' finding that a federal court could appoint a Special State's Attorney pursuant to 55 ILCS 5/3-9008 is relevant to the instant case as it clearly conflicts with the District Court's ruling that it lacked authority to appoint a Special State's Attorney and an appointment must take place before a state court. The U.S. District Court refused to exercise its jurisdictional authority to appoint a Special State's Attorney based on its assertion that there was no federal hook on the issue of whether the County of Will was properly before the Court in a legally cognizable form. In addressing Petitioners' Motion to Disqualify the unauthorized representation of the County of Will, the U.S. District Court states that:

> All right. I don't think that it's within my jurisdiction to get involved in that. If you want to take an action in the state courts to enforce that, I don't see any federal hook on that motion at all. If the State's Attorney has appointed counsel to represent his client, that is a state matter, and it has nothing to do with the underlying federal action in this case. So that motion is denied. (See transcript of proceedings on the Petitioners'

Motion to Disqualify the law firm of Kiesler and Berman, App.D, p.28a, Petition for Writ of Certiorari, 05-137).

The District court clearly and unambiguously refuses to exercise its jurisdiction pursuant to 28 U.S.C. 1654 and 28 U.S.C. 1652 to require the County of Will to appear in a legally cognizable form pursuant to 55 ILCS 5/3-9008 in the form of the Will County State's Attorney whose duty it was to appear in his official capacity and defend the County of Will pursuant to 55 ILCS 5/3-9005 (a) (4) (See App. I, p. 37a, Petition for Writ of Ceritorari, No. 05-137).

By the same token, Petitioners had filed a motion in the 7th Circuit Court of Appeals to Strike the County's Rule 26.1 Disclosure Statement since it had been submitted by the unauthorized, un-appointed private law firm that had been representing the County of Will. The Appellate Court denied the Petitioners' Motion to Strike the Rule 26.1 Disclosure Statement. The 7th Circuit went on to affirm the District Court's action refusing to exercise its jurisdictional authority in granting the Petitioners' Motion to Disqualify, (See App. B, p. 6a), wherein the 7th Circuit's unpublished opinion stated that, "The district court properly denied Schneider and Bally's motion."

Petitioners were duty bound pursuant to 7th Circuit Rule 28 (a) (3) (iv), to bring to the attention of the Court the in personam jurisdictional problem confronting them. Petitioners fully complied with their duty by indicating that the certified docket sheets in the record on appeal presented irrefutable evidence and proof of the jurisdictional problem. Petitioners also provided irrefutable proof of the improper appointment by the Will Co. State's Attorney as well as the district court's understanding that it was the Will County State's Attorney

that appointed the law firm of Kiesler and Berman to defend the County of Will. The Will County State's Attorney cannot reasonably be construed as a "Court of law" having the statutory authority to appoint a Special State's Attorney. 55 ILCS 5/3-9008 only allows a Court to appoint a Special State's Attorney. A State's Attorney has no conceivable authority to appoint a Special State's Attorney.

Thus, without the statutorily required Will County State's Attorney for the County of Will properly before the Court in a legally cognizable form, the summary judgment in favor of the County should be declared void as a matter of law and all actions and pleadings made by any attorney other than the Will Co. State's Attorney should be expunged from the record since 55 ILCS 5/3-9008 is clear and unambiguous in its language requiring appointment by the Court in which the proceedings are pending of a Special State's Attorney when a State's Attorney cannot attend to the action (See App. I, p. 37a).

Moreover, the phraseology "is pending" contained in the statutory language of 55 ILCS 5/3-9008 clearly requires the appointment to be made before any proceedings get underway. The Will County Board failed in their duty to present a Motion to Appoint a Special State's Attorney to the U.S. District Court. Petitioners' only option to comply with their duty under Circuit Rule 28 (a) (3) (iv), was to bring a Motion to Disqualify the unauthorized representation of the County of Will so that a non-void, non-voidable final judgment could be entered in favor of the Petitioners. Because the certified docket sheets in the record on appeal fail to affirmatively show or indicate the entry of the appearance of the Will Co. State's Attorney to defend the County of Will at any time, the judgment may be found to be void as a matter of law as well as all pleadings and actions by the unauthorized

attorneys, People v. Dunson, 316 Ill. App. 3d 760, 737 N.E. 2d 699, 250 Ill. Dec. 77. The certified docket sheets in the record on appeal fail to show that any attorney representing and defending the County of Will furnished any federal court with any evidence of any authority to defend the County of Will pursuant to a valid appointment by a Court of competent jurisdiction by causing such evidence to appear in the record. In the 7th Circuit's Schmude v. Sheahan decision, the 7th Court of Appeals holds that "federal courts can play a role in appointment matters under 55 ILL. COMP. STAT. 5/3-9008." In Schmude the 7th Circuit review panel rejected assertions that were made by Cook County attorneys in their briefs on appeal that only state courts had authority to appoint a Special State's Attorney. On that issue the 7th Circuit stated that "[w]e are confident that the statute's permissive language anticipates circumstances under which both state and federal courts can appoint Special State's Attorneys.

The 7th Circuit clearly and unambiguously recognizes in the Schmude opinion that a federal court has authority to appoint a Special State's Attorney. Thus, the ruling by the U.S. District Court that it had no jurisdiction to appoint a Special State's Attorney is clearly in error and conflicts with the 7th Circuit's Schmude decision. As a result of this decision, the ruling by the 7th Circuit Court of Appeals in the instant case in which it stated "[t]he district court properly denied Schneider and Bally's motion," (See App. B, p. 6a) has been conclusively and irrefutably overturned.

Since the 7th Circuit has now held in Schmude that a U.S. District Court has authority and jurisdiction to exercise when appointing a Special State's Attorney pursuant to 55 ILCS 5/3-9008, the Schmude Court's ruling clears the way for this Court to find that the summary judgment in favor of the County of Will is void, since this Court has held that without

jurisdiction over a party, any judgment rendered against that party is void. This allows this Court to enter an order vacating summary judgment in favor of the County of Will since the County was never before the federal Courts in a legally cognizable form as the record on appeal affirmatively fails to show the entry of the appearance of the County of Will by the Will County State's Attorney. This Court's precedent set in U.X. Gunter, Jr. v. Atlantic Coast Line Railroad Co., 200 U.S. 273, 26 S. Ct. 252 wherein it was held that a federal court must give effect to and abide by a state statute that requires a designated attorney to represent a governmental party must not be overturned by allowing the continued representation by the attorneys lacking the authority to defend the County of Will in the instant case. This Court should declare that the summary judgment entered in favor of the County of Will is void and all actions by unauthorized counsel for the County of Will void ab initio.

No justifiable reason to continue to allow the County of Will to ignore the clear mandate of 55 ILCS 5/3-9008 exists when one considers the Will County Board's past firsthand experience with the Special State's Attorney statute. The fact that numerous members of the present members of the Executive Committee of the Will County Board had been members of the Will Co. Executive Committee and privy to a 1997 Official Letter of Opinion from the Illinois Attorney General, Jim Ryan, (File No. 97-001, issued January 9, 1997) on the issue of appointment of a Special State's Attorney was central to the Attorney General's letter. Central to the issue addressed in the letter was the fact that the Will Co. Board had authorized numerous private attorneys to represent the County of Will, or Will County Officials in various tort actions. The Will Co. State's Attorney at the time, James Glasgow, wanted to appoint his own counsel to defend the County in one of the cases. A resulting dispute between the

Will County Board and Will Co. State's Attorney Glasgow ensued on the issue of authority to designate private counsel. As a result, Mr. Glasgow asked for an Official Letter of Opinion from the Attorney General to resolve the dispute. Importantly, Mr. Glasgow could have resorted to the Will Co. Courts to resolve the dispute. But, politically it was impractical to do so since Mr. Glasgow is and was a Democrat, while the Will Co. Board is and was overwhelmingly Republican and all of the Judges on the 12th Judicial Circuit of the Will Co. Circuit Courts were sitting Republican Judges. Politically, it was impractical to apply to the courts, so Mr. Glasgow resorted to apply to the Illinois Attorney General at the time for resolution of the dispute. As a result, Attorney General Ryan advised Will County's State's Attorney Glasgow and the Will Co. Board, among other things in that Opinion Letter, that a Special State's Attorney's appointment requires the Court in which the proceedings are pending to appoint a Special State's Attorney. Moreover, in 1997, a total of (9) sitting members of the Will County Board's Executive Committee, when the letter from Attorney General Ryan issued, remained members of the Executive Committee when Petitioners filed this federal action in late April of 2001. Thus, in the instant case, no reasonable argument can be made for defending the Will County Board's failure to perform their duty to take the necessary and proper actions pursuant to 55 ILCS 5/1-6003 to cause the County of Will to appear in a legally cognizable form by requiring Will County State's Attorney to enter his appearance in the U.S. District Court and require the appointment of a Special State's Attorney in accordance with 55 ILCS 5/3-9008.

In summary, the ruling made in the instant case by the 7th Circuit Court of Appeals holding that the District Court had properly denied Petitioners' Motion to Disqualify the private law firm and attorneys defending the County of Will has been

overturned by the 7th Circuit's ruling in Schmude (supra) that held that a District Court has authority under the provisions of 55 ILCS 5/3-9008 to appoint a Special State's Attorney.

Respectfully submitted,

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